90-797

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GAS SPRING CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of evidence that employees were motivated to strike over both economic and unfair labor practice issues, the Court of Appeals erred in refusing to apply the principles of *Price Waterhouse v. Hopkins* to afford the employer an affirmative defense to the strikers' claim by showing that the employees would have struck even in the absence of the unfair labor practice.

2. Whether the Court of Appeals improperly extended the doctrine established by this Court in *NLRB v. Truitt Manufacturing Co.*, by requiring an employer to open its financial books to a union because the employer sought economic concessions in collective bargaining for its long-term financial health, and not because of a current inability to pay the economic demands of the union.

PARTIES BELOW

In addition to the parties listed in the caption, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1612 were intervenors in the Court of Appeals.

STATEMENT PURSUANT TO RULE 29.1

Gas Spring Company is a division of Fichtel & Sachs Industries, Inc., which is in turn a subsidiary of Fichtel & Sachs AG, Stabilus GMBH and Mannesmann Capital Corporation. Stabilus GMBH is a subsidiary of Fichtel & Sachs AG. Fichtel & Sachs AG and Mannesmann Capital Corporation are subsidiaries of Mannesmann A.G.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Petitioner, Gas Spring Company, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported, and is reproduced in the appendix to this petition at 1a.[1] The order of the Court of Appeals denying rehearing and rehearing in banc is reproduced at 79a.

The opinions of the Administrative Law Judge and the National Labor Relations Board are reproduced at 14a and 10a, respectively.

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[1] All references to materials in the appendix are denoted —a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1990. A timely petition for rehearing and rehearing in banc was denied on August 21, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

This case arises under the National Labor Relations Act (NLRA), 29 U.S.C. § 141 *et seq.* Relevant sections of the Act provide:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. Section 158; National Labor Relations Act, Sections 8(a)(1), 8(a)(3) and 8(a)(5).

STATEMENT

This case arises from a strike by members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1612 ("the Union") against petitioner, Gas Spring Company ("the Company" or "Gas Spring") which began in July, 1986.

The strike stemmed from negotiations over the renewal of a collective bargaining agreement between the parties covering Gas Spring's plant in Colmar, Pennsylvania.

The previous three-year collective bargaining agreement was due to expire on June 30, 1986.

In early June, 1986, the parties began negotiating a new agreement. During the bargaining, Gas Spring sought reductions in a variety of employment benefits in order to preserve its long-term financial health. At the beginning of the negotiations, Gas Spring proposed a one year agreement, which included freezing wages, reducing some wages by eliminating a previously granted cost-of-living increase and requiring employees to share in health insurance premiums (16-17a). The Union, on the other hand, began negotiations by demanding a three-year agreement, with yearly increases of wages, and a variety of better benefits in over 30 categories (17a).

In addition to these economic issues, the Company made several non-economic demands, including changes in union security and checkoff provisions and the alteration of strict seniority. The Union claimed that the checkoff and security provisions were an "absolute necessity" and that the Union would never accept their alteration or removal. A Union representative referred to many of the Company's non-economic proposals as presenting "serious" and "strike" issues (66a).

On June 13, while negotiating over the economic issues, a Union representative asked a representative for the Company whether it was claiming that it was in dire financial straits, to which the employer's representative replied that Gas Spring was not in dire financial straits, nor was it claiming that it was unable to pay the benefits sought by the Union (17a). The evidence is uncontradicted that Gas Spring's representative stated: "[W]e are not claiming an inability to pay . . . . [W]e are proposing not to pay. We choose not to pay." (18a). A Union representative then commented to his fellow negotiators that Gas Spring was saying that it could pay, but it just did not want to (18a).

As negotiations continued, Gas Spring continued to seek concessions. Although (as the Court of Appeals found), Gas Spring maintained throughout the bargaining process that its demands for concessions were not motivated by financial necessity (3a), the Union representatives demanded that Gas Spring open its financial books to the Union. Gas Spring declined on the grounds that, since it was not claiming a current inability to pay, it had no obligation to disclose its financial records.

In resisting Gas Spring's request for concessions, the Union asserted its belief that the Company was highly profitable (25a, 34a). Gas Spring responded that the Union was incorrect and that, in fact, the Company was facing steadily declining sales (26a). Gas Spring repeatedly stressed, however, that it was currently liquid and able to meet all its financial obligations, and that it was not seeking concessions because of a current inability to pay (27a).

Negotiations continued. By the end of negotiations, eighteen issues still remained to be resolved, including the key economic proposals of the Company outlined above and the critical non-economic issues involving union security and seniority (37a, n.30).

On June 28, the Union held a membership meeting to discuss the status of bargaining. After further negotiations proved unfruitful, the Union again held a membership meeting on July 1, at which the Company's last offer was described to the Union membership, which voted overwhelmingly to reject it (36-37a).

The strike commenced that day. From July 1, until September, the Union's picket signs did not refer to an unfair labor practice, but only to job security, working conditions and equality (63a). On July 25, a Union representative stated that the Union was on strike either because of what Gas Spring had offered or because of the failure of the parties to agree on concessions (63a). A Union report, dated July 28, made no mention of the

strike being caused by the withholding of financial data or of the strike being an unfair labor practice strike (63a). In addition, two Union representatives gave signed (and in one case sworn) statements that the sole cause of the strike was that Gas Spring bargained with no sincere desire to reach agreement (63a).

By October 6, 72 employees had returned to work and, in addition, Gas Spring had hired 119 permanent replacements. On that date, the Union made an unconditional offer to return to work on behalf of its employees and notified Gas Spring that the strike was terminated. Because Gas Spring believed that the workers were properly classified as economic strikers, it did not discharge the replacements in order to immediately reinstate the previously striking employees, but placed the strikers on a preferential recall list (41-42a). In the interim, the Union filed an unfair labor practice charge based on Gas Spring's refusal to open its books.

A. The Administrative Law Judge's Opinion

The Administrative Law Judge, whose opinion was adopted by the Board, specifically found that Gas Spring did *not* claim at the beginning of negotiations that it sought the concessions because it was unable to pay higher benefits (17a). The ALJ nevertheless found that Gas Spring had an obligation to open its financial records with the Union.

The ALJ did so by holding that once the Gas Spring representatives began to talk about its reasons for seeking concessions in terms of Gas Spring's specific needs and requirements, the Company "opened the door" to the Union's demand to review the books (53a). The ALJ asserted that an employer has an obligation to open its books whenever it relies upon its own financial condition and the projected injury to its business to seek concessions, rather than general economic conditions or competition (54a). Under the ALJ's analysis therefore, it did not matter whether or not Gas Spring had claimed an

inability to pay; as long as the Company had focused its need for concessions on its own economic health—whether long term or not—then Gas Spring committed an unfair labor practice by declining to open its books to the Union.

Addressing the nexus between the Union's demand that it review the books and the cause of the strike, the ALJ reviewed the testimony regarding the two Union meetings on June 28 and July 1. Noting that is was "imposssible to reconcile" the testimony of the Union employees who testified about the meetings, the ALJ specifically found that there was no mention of the Union's demand to open the books at the June 28 meeting (40-41a). The ALJ did find that the demand was mentioned at the July 1 meeting (at which the strike vote was taken), in the context of explaining Gas Spring's position that it was asking the Union to accept the wage and benefit concessions (62a). Rejecting the evidence that, until September, the Union pickets referred only to economic issues and not an unfair labor practice and the signed (and in one case sworn) statements from the Union representatives that the strike was motivated by economics, as well as the fact that there were non-economic issues still unresolved, the ALJ nevertheless concluded that the strike was an unfair labor practice strike from its inception.

The ALJ therefore held that, by declining to open its books, Gas Spring violated sections 8(a)(5) and (1) of the NLRA, 29 U.S.C. §§ 158(a)(5), (1) and by not reinstating the striking employees upon their unconditional offer to return to work, violated section 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3), (1). The National Labor Relations Board substantially affirmed the rulings, findings and conclusions, and adopted the ALJ's recommended order.

B. The Court of Appeals' Decision

Gas Spring appealed these determinations to the United States Court of Appeals for the Fourth Circuit. The Court upheld the Board's finding that Gas Spring com-

mitted an unfair labor practice by declining to open its books.

Turning to whether the unfair labor practice sufficiently motivated the strikers to the extent that the strike was properly classified as an unfair labor practice strike, the Court, stating that its "reading of the governing precedent is different," rejected Gas Spring's contention that an unfair labor practice strike exists only when, but for the employer's unfair labor practices, the strike would not have occurred (7-8a). Instead, because the Court found that the alleged unfair labor practice was one of the factors contributing to the decision to strike, the strike was properly classified as an unfair labor practice strike, and the Company was liable for backpay during the period it refused to immediately reinstate the workers (8-9a).

Gas Spring filed a timely petition for rehearing and rehearing in banc, essentially raising the questions raised by this petition. The Court of Appeals denied both petitions.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' FAILURE TO APPLY THE PROPER BURDEN OF PROOF IN CHARACTERIZING A STRIKE MOTIVATED BY DUAL MOTIVES IMPLICATES AN IMPORTANT AND UNSETTLED ISSUE OF FEDERAL LABOR LAW

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court addressed the proper burden of proof in determining whether an employer could be held liable for its employment action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, in light of evidence that the employer was motivated by both permissible and impermissible factors. In sum, the Court held that, even if the employer acted in part with discriminatory motives, the employer had an affirmative defense if it could show, by a preponderance of the evidence, that

it would have taken the same action even in the absence of the discriminatory motive.

This same mixed motive analysis has been adopted by this Court in analyzing discrimination under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(3), which makes it unlawful to discharge a worker because of union activity. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Court upheld the National Labor Relations Board's rule, first articulated in *Wright Line*, 251 N.L.R.B. 1080 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), that an employer could avoid a finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union.[2]

Similarly, in this case there is evidence that the employees who struck Gas Spring had "dual motives" for their actions: the strike was motivated by both economic issues and by Gas Spring's purported unfair labor practices. As a result, Gas Spring argued before the Court of Appeals, in line with *Price Waterhouse* and *Transportation Management*, that the strikers should be considered economic strikers if Gas Spring could demonstrate that the strike would have occurred in any event over purely economic concerns. Because the Court of Appeals' rejection of this argument conflicts with the logic of

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[2] The Board itself has stated that the *Wright Line* analysis applies to *all* section 8(a)(3) and 8(a)(1) discharge cases. *Frank Black Mechanical Services, Inc.*, 271 N.L.R.B. 1302 n.2 (1984). Indeed, other courts and even the NLRB have suggested that the *Wright Line* test should be applied to questions of mixed motivation outside of section 8(a)(3) of the Act. *See, e.g., NLRB v. Sea-Land Service, Inc.*, 837 F.2d 1387 (5th Cir. 1988) (applying *Wright Line* to violation of section 8(a)(4) of the Act); *P*I*E Nationwide Inc.*, 295 N.L.R.B. No. 43, 131 L.R.R.M. 1674 (1989) (same), *enf'd*, 894 F.2d 887 (7th Cir. 1990); *Taylor & Gaskin, Inc.*, 277 N.L.R.B. 563 (1985) (same).

Price Waterhouse and *Transportation Management* as well as the opinions of other Courts of Appeals, and because the question reflects an issue of substantial import under the nation's labor laws, this Court should grant Gas Spring's petition for *certiorari*.

A. The Court of Appeals' Distribution of Burdens is at Odds with This Court's Allocation of Burdens in Mixed Motive Cases

The Court of Appeals characterized Gas Spring's argument as to the proper burden of proof to be used in a mixed motivation strike as follows: "Essentially, the employer argues that the relevant decisions hold that an unfair labor practice strike exists only when, but for the employer's unfair labor practices, the strike would not have occurred." (7-8a). In essence, this was the standard adopted by this Court in *Price Waterhouse* and *Transportation Management*.[3] The Court of Appeals, however, rejected this standard, holding that in order for the strike to qualify as an unfair labor practice strike, "the employer's unfair labor practice must only be *one* of the factors contributing to the decision to strike." (8a) (emphasis in original). The Court therefore concluded that as long as an employer's unfair labor practice was a factor contributing to the strike, it did not matter that the employees would have struck over purely economic issues in any event.

The Fourth Circuit's ruling is at odds with this Court's recent decisions addressing the questions of mixed motivation. As this Court noted in *Price Waterhouse*, each time the question of mixed motive has come before the

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[3] Gas Spring did not, in fact claim that a "but for" test was appropriate. Instead, it cited to this Court's decision in *Price Waterhouse* as providing the appropriate test. To the extent that the plurality in *Price Waterhouse* suggested that it was not establishing a "but for" test, *see Price Waterhouse*, 109 S.Ct. at 1785-1786 (plurality opinion), Gas Spring does not advocate a different standard from that established by the plurality.

Court it has "concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive." *Price Waterhouse*, —— U.S. ——, 109 S. Ct. at 1790. Thus, this Court has applied this analysis in *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977) (applying analysis to discharge motivated by both illegal constitutional and legal grounds); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (applying analysis to mixed motives for enactment of legislation); *Hunter v. Underwood*, 471 U.S. 222 (1985) (same); and *Transportation Management*.

The foregoing cases establish an overarching principle that the analysis is appropriate whenever "the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits." *Price Waterhouse*, 109 S. Ct. at 1789. Indeed, as Justice O'Connor has noted, in multiple causation cases the common law of torts allows defendants to prove that their negligent actions were not the "but-for" cause of the plaintiff's injury, and also allows a defendant whose tortious conduct combines with a force of unknown or innocent origin to similarly demonstrate that his actions were not the "but-for" cause of the harm to the plaintiff. *Price Waterhouse*, 109 S. Ct. at 1797-1798 (O'Connor, concurring).

There is no reason why an employer facing mixed-motive strikers should not be afforded the same defense. Indeed, depriving an employer of the affirmative defense upsets the careful balance of union, employer, and replacement striker rights set out under the Act. When economic strikers strike, the employer has a right to protect and continue his business by filling places left vacant by strikers, and is not required to discharge those hired to fill the places of strikers upon the election of the latter

to resume their employment. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938).

By providing an employer with an affirmative defense, this Court's decision in *Price Waterhouse* struck a balance between an employee's right not to be discharged for discriminatory motives and the employer's retention of the prerogative to terminate an employee for causes other than illegal discrimination even when he has acted illegally. *See Price Waterhouse*, 109 S. Ct. at 1786. Similarly, if an employer is to retain the prerogatives granted to him by the National Labor Relations Act, he too should have a similar affirmative defense even if he engaged in illegal actions.

In fact, a contrary result is arbitrary, because the courts have allowed unions the same defense when the union is accused of causing damage arising out of a mixed-motive strike under section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), which generally prohibits any labor organization from engaging in "secondary activity" against neutral employers.

Section 303(b) of the Act allows anyone who is injured in his business or property by reason of a union's violation of Section 8(b)(4) to sue for damages in Federal District Court. 29 U.S.C. Section 187(b); *Mead v. Retail Clerks Int'l Association, Local Union No. 839 AFL-CIO*, 523 F.2d 1371 (9th Cir. 1975). In interpreting the "by reason of" language of Section 303(b), the Courts of Appeals have held that there must be a "'causal nexus'" between the labor organization's unfair labor practice under 8(b)(4) and the person's injury. *See, e.g., Feather v. United Mine Workers of America*, 903 F.2d 961, 965 (3d Cir. 1990); *Mead*, 523 F.2d 1371 (9th Cir. 1975). A "causal nexus" exists only if the unlawful conduct itself "materially contributed" to or was a "substantial factor" in bringing about the injury. *Feather*, 903 F.2d at 965-966; *Mead*, 523 F.2d at 1376. According to both courts, when a union

strikes in part over an unlawful objective, if "'[the lawful] objectives, standing alone, would have caused the strike, but the unlawful objective, standing alone would not,' the materiality test is not met." *Feather*, 903 F.2d at 966; *Mead*, 523 F.2d at 1379.

In essence, therefore, when a union faces liability because of strike actions arising from both legal and illegal motives, it is afforded an affirmative defense if it can show that its strike would have occurred in the absence of illegal motivation. However, when the employer faces liability because the union's strike was motivated by both the legal and illegal actions of the employer, the employer is not afforded the same defense.

In sum, even though the Court has adopted a similar standard of causation in addressing whether an employer has illegally discharged an employee when there was also evidence of a legal motivation for the discharge, and has has even adopted, in *Transportation Management Corp.*, that standard under the National Labor Relations Act, it has never addressed the proper standard for determining the character of a strike when there is evidence of mixed motivation. Because the Court of Appeals refused to apply the mixed-motive analysis approved by this Court in *Price Waterhouse* and its predecessors, and because this refusal results in an inequitable and irrational distinction between employers and unions under the Act, the Court should grant the petition to determine whether the Fourth Circuit's failure to import the mixed motive analysis of *Price Waterhouse* and its predecessors was in error.

B. The Courts of Appeals and the National Labor Relations Board Have Applied Inconsistent and Conflicting Standards in Determining Employer Liability for Mixed Motive Strikes

An additional reason for granting the petition is that the Courts of Appeals and the Board itself have not applied a uniform standard in characterizing a mixed-

motive strike, nor have they uniformly allowed or disallowed an affirmative defense to the employer if he can show that the strike would have occurred over purely economic issues.

In classifying a strike, some courts have held that a strike is an unfair labor practice strike if the unfair labor practice was a "contributing cause" or "contributing factor." *See, e.g. Teamsters Local Union 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990); *Laphan-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1187 (7th Cir. 1990); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981); *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978). *Cf. Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989) ("A strike that is caused *in whole or in part* by an employer's unfair labor practices is an unfair practice strike") (emphasis in original). Others have stated that a mixed motive strike is an unfair labor practice strike if "an unfair labor practice had anything to do with causing the strike." *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), *cert. denied*, 409 U.S. 850 (1972); *General Drivers and Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (1962). Yet another court has said that "there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices." *Road Sprinkler Fitters Local Union No. 699 v. NLRB*, 681 F.2d 11, 20 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983). And here, the Court of Appeals stated: "[I]n order for a strike to qualify as an unfair labor practice strike, the employer's unfair labor practice must only be *one* of the factors contributing to the decision to strike." (8a).

The Board has similarly used different language in determining strike causation. In some instances, it has invoked the "contributing cause" language. *See, e.g., North*

American Coal, 289 N.L.R.B. No. 102, 129 L.R.R.M. 1012, 1013 (1988); *Reichhold Chemical*, 288 N.L.R.B. 69, 127 L.R.R.M. 1265, 1268 (1988), *rev'd in part sub nom. Teamsters Local Union 515*, 906 F.2d 719 (D.C. Cir. 1990). In others, it has invoked the "direct outcome" test. *See, e.g., Lion Uniform, Janesville Apparel Div.*, 259 N.L.R.B. 1141, 109 L.R.R.M. 1093 (1982); *Typoservice Corp.*, 203 N.L.R.B. 1180, 83 L.R.R.M. 1595 (1973). The Board has also stated that a strike is an unfair labor practice strike even if the strike is prompted in part, or even primarily, by economic issues. *See, e.g. Blu-Fountain Manor*, 270 N.L.R.B. 199, 116 L.R.R.M. 1219, *enforced sub nom., NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195 (7th Cir. 1986). In another instance, the Board has said: "Unfair labor practices, as provocation for strike activity, must be more than a source of dissatisfaction. They must be one of the assigned reasons for striking." *Keller Manufacturing Co.*, 272 N.L.R.B. 763, 804, 117 L.R.R.M. 1425 (1984). In another instance, the Board said that to qualify as an unfair labor practice strike, the practices must be "the resulting factor" in the strike. *Indiana Desk Co.*, 276 N.L.R.B. 1429, 1336, 120 L.R.R.M. 1309 (1985).[4]

Not only do the Courts and the Board invoke varying and conflicting language in determining strike causation, but there is clearly no consensus on whether, once a strike is deemed to be an unfair labor practice strike, the employer can nevertheless escape the liability which attaches upon such a finding by demonstrating that the employees would have struck in any event. The Fourth Circuit in this case refused to afford Gas Spring an affirmative defense based upon the *Hopkins/Transportation Management* standard. The District of Columbia and Seventh

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[4] The variations in language used by the Courts of Appeal and the Board in this case mirror the variations used by the Courts of Appeal in determining liability under Title VII prior to this Court's decision in *Price Waterhouse*. *See Price Waterhouse*, 109 S.Ct. at 1784 n.2.

Circuits have similarly rejected such a defense. *See Teamsters Local Union 515 v. NLRB*, 906 F.2d 719, 723; *Northern Wire Corp. v. NLRB*, 887 F.2d at 1319-1320. However, the Sixth and Third Circuits have stated that an unfair labor practice is not a "contributing cause" of the strike if the employer can show that the strike would have occurred even if the employer had not committed unfair labor practices. *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 175-176 (3d Cir. 1939), *cert. denied*, 308 U.S. 605 (1939).[5] *See also NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938) (suggesting that employer may escape liability for unfair labor practice strike if it can show that strike would have occurred even in absence of unfair labor practices), *cert. denied*, 304 U.S. 576 (1938).[6]

It is clear that the Courts and the Board have been inconsistent in determining an employer's liability for a mixed-motive strike. As the lower courts did before *Price Waterhouse*, most of the courts and the Board have articulated different standards of causation. Furthermore, some have failed to embrace the two distinct elements which a fact-finder must address in reviewing mixed-motive strike cases, the cause of the strike and employer liability, but rather treat causation and liability as a single question. The Court should grant the peti-

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[5] Although the Courts in *Stackpole* and *Larand Leisurelies* state that the employer's showing rebuts a finding that the unfair labor practice was a "contributing cause," under *Price Waterhouse* the showing is more properly understood as a defense to the employer's liability for committing an unfair labor practice.

[6] At least one lower court has adopted the mixed motive analysis of *Price Waterhouse* and *Transportation Management* in determining strike causation. *See General Electric Co. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 647*, 568 F. Supp. 1138 (S.D. Ohio 1983) (determining whether cause of strike was illegal under terms of collective bargaining agreement).

tion to resolve these conflicts among the circuits, and to make clear, consistent with *Price Waterhouse* and its predecessors, that causation and liability are distinct issues.

C. The Proper Standard of Employer Liability Resulting From a Mixed Motive Strike is an Important and Common Issue

The standard for determining employer liability arising from a mixed motive strike is extremely important under the nation's labor laws because, unlike employees who strike for economic reasons, unfair labor practice strikers are entitled to immediate reinstatement with backpay, even if permanent replacements for them have been hired. As the Court in *Northern Wire* noted, the proper characterization of a strike is of "major consequence" to the strikers' right to reinstatement. *See Northern Wire*, 887 F.2d at 1319. In fact, even while rejecting the *Wright Line* model in determining the motivation of strikers, the Court in *Northern Wire* called the issue of *Wright Line*'s applicability to mixed motive strikes "compelling." *Id.*

Furthermore, the Courts of Appeals (and the Board) are frequently faced with the proper characterization of a strike and employer liability when there is evidence of mixed motives. In the past two years, the issue has been presented not only to the Fourth Circuit in this case, but also to the District of Columbia Circuit (in *Teamsters Local Union No. 515*), the Sixth Circuit, *see Columbia Portland Cement Co. v. NLRB*, No. 89-6105, 1990 U.S. App. LEXIS 17,249 (6th Cir. Oct. 2, 1990),[7] and the

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[7] In *Columbia Portland Cement Co.*, the Sixth Circuit cited to *Larand Leisurelies* for the proposition that an unfair labor practice must be a "contributing cause" of a strike for it to be considered an unfair labor practice strike. As noted earlier, the Court in *Larand Leisurelies* did afford an employer an affirmative defense to liability upon a showing that the strike would have occurred even in the absence of the unfair labor practice.

Seventh Circuit (in both *Northern Wire Corp.* and *Lapham-Hickey Steel Corp.*). The Court should grant the petition to address this commonly raised issue of substantial significance to the country's labor community.

II. THE APPELLATE COURT IMPROPERLY IMPOSED A FINANCIAL DISCLOSURE OBLIGATION UPON THE PETITIONER BY FAILING TO DISTINGUISH BETWEEN AN EMPLOYER'S CLAIMED CURRENT INABILITY TO PAY HIGHER WAGES AND A REFUSAL TO PAY HIGHER WAGES BASED UPON LONG-TERM FINANCIAL GOALS

The Board predicated its holding that the workers engaged in an unfair labor strike by finding that Gas Spring committed an unfair labor practice when it refused to open its financial records to the Union. Because the Fourth Circuit, in upholding the Board's finding, failed to distinguish between an employer's claim in collective bargaining that it is currently unable to pay (which triggers a disclosure obligation) and an assertion that it is unwilling to pay higher wages in order to ensure long-term financial health and competitiveness, this Court should grant Gas Spring's petition to resolve the issue of whether the latter situation compels employer disclosure.

This Court has held that it is an unfair labor practice for an employer which claims in negotiations that it is incapable of paying a wage increase to refuse to open its books to the union in order for it to verify the claim. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). However, the Courts of Appeals have acknowledged a distinction between a company's bargaining stance based on a current inability to pay and a bargaining position based on the employer's general and long-term financial condition.

The Seventh Circuit has held that, in the latter situation, no disclosure obligation exists. *See, Nielsen Litho-*

graphing Co. v. NLRB, 854 F.2d 1063, 1065-1066 (7th Cir. 1988); *NLRB v. Harvstone Manufacturing Corp.*, 785 F.2d 570 (7th Cir.), *cert. denied*, 479 U.S. 821 (1986). The Fourth Circuit, in a case decided prior to the case at bar, also held that an employer who sought concessions to narrow the cost gap between it and its competitors in order to preserve its long-term market position was not required to disclose its books to the union. *Washington Materials, Inc. v. NLRB*, 803 F.2d 1333, 1338-39 (4th Cir. 1986).[8] The Tenth Circuit has recently supported the distinction set out in *Nielsen* and *Harvstone*, *see Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 980 (10th Cir. 1990), as has the Sixth Circuit. *See American Model and Pattern, Inc. v. NLRB*, No. 85-6060 (6th Cir. 1987) (unpublished opinion). The Court of Appeals for the District of Columbia, in an opinion by then Circuit Judge Burger, also held that a company was not under an obligation to open its books when it did not claim financial inability to pay but rather that it was paying rates in excess of prevailing rates of its competition. *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966).

The logic of these cases is set out by the Seventh Circuit in *Harvstone*. Concluding that the relevant time period for evaluating claims of inability to pay is the

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[8] The Court of Appeals did not even discuss the applicability of *Harvstone* or its own precedent, *Washington Materials*. Moreover, the Administrative Law Judge, whose opinion was adopted by the Board, rejected *Harvstone* primarily because "[T]he court's decision does not reflect Board law" and that "The Board has instructed its administrative law judges that Board precedents, not court of appeals law, are to be followed unless overruled by the United States Supreme Court." (55-56a). In *Nielsen*, Judge Posner, while recognizing the Board was not bound to Court of Appeals precedent, specifically criticized the Board's unwillingness to follow the holding of *Harvstone* within the same circuit. *Nielsen*, 854 F.2d at 1065 *et seq.*

term of the new collective bargaining agreement, the Court stated:

> [A]n employer, already operating at a competitive disadvantage with respect to employee compensation, could afford to pay increased wages during the course of a new agreement. While it is axiomatic that this scenario cannot be played out indefinitely, it does not preclude a finding that, at least for the term of the new collective bargaining agreement, the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages.

Harvstone, 785 F.2d at 577. In such cases, according to the Court, an employer's claim of competitive disadvantage is not a plea of inability to pay, triggering a disclosure obligation. *Id.*

In upholding the Administrative Law Judge's findings in this case, however, the Fourth Circuit concluded that the employer's "references to its worsening financial conditions, its claims that it was 'heading into the red,' and its forecasts of the loss of jobs" provided substantial evidence with which the Board could have concluded that Gas Spring's bargaining position was a claim of current inability to pay (7a). However, such statements should be insufficient under *Harvstone* and *Washington Materials* to create a disclosure obligation based on a claimed current inability to pay.

This Court should grant the petition in order to define the contours of *Truitt*. If *Truitt* is expanded to cover situations where an employer refuses to bargain over higher wages because of long-term financial concerns, the effect on the business community will be substantial. Employers frequently seek wage concessions to achieve all sorts of long-term goals, such as improving profitability or raising capital for research and product development. If an employer is obligated to disclose its financial records under such circumstances, the standard

rule will become either that an employer must open its books whenever its seeks concessions, vastly expanding the contours of *Truitt*, or employers will have to refrain from seeking such concessions. These potential deleterious effects on the bargaining process should be considered by the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 19, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2448

GAS SPRING COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, and ITS LOCAL UNION NO. 1612,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
(4-CA-16038, 4-CA-16157)

Argued: April 5, 1990 Decided: July 16, 1990

Before CHAPMAN and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: Thomas Guy Greaves, III, HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A., Greenville, South Carolina, for Petitioner. William Allen Baudler, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent. ON BRIEF: Vereen A. Dennis, HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A., Greenville, South Carolina, for Petitioner. Jerry M. Hunter, General Counsel, Robert E. Allen, Associate General Counsel, Aileen A. Armstrong Deputy Associate General Counsel, Charles Donnelly, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent. Richard H. Markowitz, William T. Josem, MARKOWITZ & RICHMAN, Philadelphia, Pennsylvania, for Intervenor.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

On this appeal, the appellant-employer seeks reversal of the National Labor Relations Board's finding of unfair labor practices arising from collective bargaining negotiations between the employer and the union in June 1986. The Board found that, in the course of the negotiations, the employer pleaded financial inability to meet the union's bargaining demands. In light of this finding, the Board held that the employer's subsequent refusal to open its books to inspection by the union constituted a failure to bargain in good faith. The Board further held that the ensuing strike was motivated by the employer's failure to bargain in good faith and therefore qualified as an unfair labor practice strike with the result that the employer's refusal to reinstate striking employees on

request also constituted an unfair labor practice. Our review of the record reveals that these findings are supported by substantial evidence and there was no error by the Board. We therefore enforce its ruling.

I.

This dispute arose between the employer, Gas Spring Company, and the union, the International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1612, during negotiation of the collective bargaining agreement covering the employer's plant in Colmar, Pennsylvania. The union has served as the exclusive bargaining agent for the employer's Colmar employees since 1973. When these negotiations began, the employees had been covered by an agreement that had been in effect for three years and was to expire June 30, 1986.

In early June 1986, the union and the employer began negotiating to form a new agreement. During the bargaining, the employer made numerous demands for reductions in a wide variety of employment benefits. Although it repeatedly claimed that its demands were not motivated by financial necessity, the employer asserted that, given its economic situation, it was unwilling to provide employees with any increase in benefits. Indeed, the employer stated that it required financial concessions from the employees or jobs would be lost. In response to the employer's position, the union asked to examine the employer's financial records to confirm that the employer was unable to grant the increases that the union sought. The union stated that, if the employer was truly unable to afford increased benefits, the union would agree to some reductions. Before granting any concessions, however, the union insisted on examining the employer's books. Throughout the bargaining process, the employer maintained the position that its demands for concessions were not motivated by financial necessity and it refused to open its books to the union's examination.

After several sessions of largely fruitless bargaining, the union presented the employer's final proposal to the employees. This proposal provided for no wage increase and a reduction in employee benefits. The record shows that, during the discussion of the proposal, the employees expressed dissatisfaction both with the reduction in benefits and with the employer's refusal to provide financial information to support these reductions. On July 1, 1986, the employees voted to strike, and thereafter the union filed an unfair labor practice charge because of the employer's refusal to substantiate its claim of inability to pay increased benefits. On October 6, 1986, the union made an unconditional offer to return to work on behalf of all employees who had not already done so. At that time, the employer informed the union that it considered the striking employees to be economic strikers. The employer placed these strikers on a preferential hiring list, but it did not offer them immediate employment after receiving their offer to return to work.

After the hearing on the union's charge, an ALJ found that the employer's refusal to pay increased benefits had been based on a plea of financial inability, and held that, by refusing to open its financial records in response to the union's request, the employer had failed to bargain in good faith in violation of sections 8(a)(5) and (1) of the NLRA, 29 U.S.C. §§ 158(a)(5), (1). The ALJ further held that the employer's refusal to reinstate the striking employees, after their unconditional offer to return to work, violated sections 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3), (1). A three-member panel of the NLRB affirmed the ALJ and the employer has petitioned this court for review.

II.

The employer's appeal raises two issues. The first is whether the employer invoked financial difficulties as the reason for its refusal to grant any increased benefits

during collective bargaining. If this question is answered in the affirmative, the employer's refusal to disclose financial information was an unfair labor practice, and we proceed to the second issue: were the striking employees economic strikers or unfair labor practice strikers?

A.

Under the Supreme Court's decision in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), an employer who claims financial inability to meet a union's bargaining demands incurs a duty to satisfy any questions that the union may have regarding the employer's finances by disclosing the appropriate financial information. The Court stated that, if an argument "is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Id.* at 152-53. However, if an employer takes the position that it is unwilling, rather than unable, to meet a union's demands, no duty to disclose arises because the policies underlying *Truitt* are not implicated: the employer is making no claim of financial distress that needs to be confirmed.

The question of whether an employer has claimed financial inability as a justification for its bargaining demands is inherently factual. Therefore, we subject the Board's findings on such an issue to the substantial evidence test. We must enforce the Board's ruling if we conclude that its findings are supported by substantial evidence in the record, considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Proctor & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 977 (4th Cir. 1981). Any inferences that the Board has drawn from the facts need only be reasonable. They need not be the inferences that we would have reached if the record were before us for *de novo* review. *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *Universal Camera Corp.*, 340 U.S. at 488.

None of the employer's arguments is sufficient to warrant a reversal of the Board's finding that, during bargaining, the employer claimed financial inability to meet the union's demands. In support of its position, the employer relies heavily on a number of minor factual inconsistencies in a record which, according to the ALJ who heard the evidence, was fraught with internal contradiction. These inconsistencies, however, are minor, and the ALJ's thorough opinion extensively documents the credibility determinations that he made as well as revealing the other means he used to resolve the myriad discrepancies in the record. Although the ALJ resolved a number of these evidentiary conflicts adverse to the employer, our review discloses no instance in which the resolution lacks the support of substantial evidence in the record.

The employer also contends that the ALJ gave inadequate weight to the employer's assertions during negotiations that its bargaining posture was not based on financial inability to pay increased benefits, but was instead attributable to "prudent business considerations." To merely state this argument is to immediately point up why it must fail. As the component of the administrative process charged with making factual determinations, the ALJ conducting a hearing on an unfair labor practice charge is uniquely capable of weighing the evidence with an accuray which no other tribunal, reviewing the proceeding on a cold record, can approach. *See, e.g., NLRB v. Jarm Enters., Inc.*, 785 F.2d 195, 203 (7th Cir. 1986) (it is "not the role of an appellate court" to "reevaluate the credence and weight that should be given to testimonial evidence of whether or not [the employer] claimed an inability to pay"). It would represent a gross invasion of the province of the Board and the hearing officer for this court to make the minute distinctions in the weight of the evidence that the employer suggests. This consideration alone would justify the rejection of the employer's argument, but the employer's position is

completely eroded by the prevalence in the record of its references to its worsening financial condition, its claims that it was "heading into the red," and its forecasts of the loss of jobs. There was certainly substantial evidence on which the Board could have concluded that the employer's bargaining position was a claim of financial inability to pay and not an assertion of "prudent financial considerations." *

B.

The striking employees qualified as unfair labor practice strikers if the employer's refusal to open its books contributed to the employees' decision to strike. As unfair labor practice strikers, the employees were entitled to immediate reinstatement on request and the employer's refusal to grant it constituted a separate unfair labor practice. The question then becomes, did the employer's unfair labor practice motivate the strike to an extent that it may properly be considered to be an unfair labor practice strike?

On this issue, the employer argues for a very restrictive test for strike causation. It claims that there must be a close and direct causal relationship between the unfair labor practice and the decision to strike before there exists an unfair labor practice strike. Essentially, the employer argues that the relevant decisions hold that an

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* In a final effort to avoid the consequences of its actions, the employer argues that, even if it did plead financial inability to grant concessions, its refusal to disclose financial information was justified because the union had threatened to attempt to harm the employer's relations with its customers and the possession of the financial information could have facilitated such harm. When the employer made this argument at the hearing, the ALJ recognized it for the afterthought that it was. The employer failed to raise these concerns of confidentiality until well after the strike had begun and the union had filed its unfair labor practice charge. It seems, therefore, highly unlikely that such concerns truly motivated the employer's pre-strike refusal to release the requested information.

unfair labor practice strike exists only when, but for the employer's unfair labor practices, the strike would not have occurred. Our reading of the governing precedent is different.

Under the law of this circuit, in order for a strike to qualify as an unfair labor practice strike, the employer's unfair labor practice must only be *one* of the factors contributing to the decision to strike. "[W]here the causes contributing to a strike consist of unfair labor practices and employees' desires for wage betterments, the latter should not excuse the employer from the legal consequences that flow from its conduct which transcends the permissible bounds under the National Labor Relations Act." *Northern Va. Steel Corp. v. NLRB*, 300 F.2d 168, 174 (4th Cir. 1962) (quoting *Berkshire Knitting Mills v. NLRB*, 139 F.2d 134, 137 (3d Cir. 1943)); *see also NLRB v. Stilley Plywood Co.*, 199 F.2d 319, 320 (4th Cir. 1952) (upholding finding of unfair labor practice strike "where unfair labor practices are a factor in bringing about a strike"); *cf. NLRB v. Safway Steel Scaffolds Co. of Ga.*, 383 F.2d 273, 280 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968) (strike qualifies as an unfair labor practice strike "if an unfair labor practice had anything to do with causing it"). Nor is it necessary that the union expressly advert to the employer's unfair labor practice of refusing to disclose financial information in reaching its strike decision. *See Jarm Enters. Inc.*, 785 F.2d at 204.

Under this standard, the Board's conclusion that the striking employees were unfair labor practice strikers certainly has the support of substantial evidence in the record. Although there is conflicting testimony on the question, there is evidence that, on the date of the strike vote, union leaders explained to the employees that the union negotiators had requested the employer to open its books to substantiate its claimed financial difficulties. There was also evidence that upon learning that

the company had refused to disclose any financial information, several employees at the union meeting questioned the union leaders about the employer's refusal and expressed their disbelief that the apparently profitable employer was experiencing the financial difficulties it claimed.

Here, as before, the employer is quibbling about the minor inconsistencies in the record. The presence of contradictory testimony does not change the fact that the record contains substantial evidence from which the Board could have properly found that the employer's refusal to produce its financial information was a contributing cause of the strike. The Board was therefore without error in its treatment of the striking employees as unfair labor practice strikers.

III.

For the reasons set forth above, we affirm the Board's findings of fact and conclusions of law, and we grant enforcement of the Board's order.

IT IS SO ORDERED.

296 NLRB No. 14

D-9827
Colmar, PA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 4-CA-16038
4-CA-16157

GAS SPRING COMPANY

and

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and ITS LOCAL UNION NO. 1612

DECISION AND ORDER

On September 30, 1987, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed exceptions. The Respondent filed a brief in response to the General Counsel's exceptions, and the General Counsel and the Charging Party each filed briefs in opposition to the Respondent's exceptions.[2]

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent filed a motion to strike portions of the General Counsel's answering brief. The General Counsel filed a response to the Respondent's motion. We deny the Respondent's motion.

The Respondent also filed a motion to add documents omitted from the official record. We grant this motion.

The National Labor Relations Board has delegated its authority in this proceeding a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions [4] and adopt the recommended Order.[5]

Conclusions of Law

1. The Respondent, Gas Spring Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local Union No. 1612, is a labor organization within the meaning of Section 2(5) of the Act, and is the exclusive representative within the meaning of Section

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[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent was claiming an inability to pay, we find it unnecessary to rely on his finding at fn. 35 of his decision that the word "from" in an affidavit given by Hannings, a union official, should read "at."

We note that *Nielsen Lithographing Co.*, 279 NLRB 877 (1986), which the judge cites, was remanded to the Board by the Seventh Circuit, 854 F.2d 1063 (7th Cir. 1988).

[4] The judge inadvertently failed to include a "Conclusions of Law" section in his decision. Accordingly, we shall add a "Conclusions of Law" section.

[5] The General Counsel has requested that the Order include a visitatorial clause. Under the circumstances of this case, we find it unnecessary to include such a clause. *Cherokee Marine Terminal*, 287 NLRB No. 53 (Jan. 28, 1988).

9(a) of the Act of the following unit appropriate for the purposes of collective bargaining:

> All production and maintenance employees of Gas Spring Company at its Colmar, Pennsylvania plant, excluding office clerical personnel, lab technicians, engineers, guards, and supervisors.

3. By failing to bargain in good faith with the Union by failing and refusing to turn over to the Union, on request, financial records necessary and relevant to collective bargaining, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The strike which commenced on July 1, 1986, was caused at least in part by the Respondent's unfair labor practices described above.

5. An unconditional offer to return to work was made by the Union on October 6, 1986, on behalf of all the unfair labor practice strikers.

6. By failing and refusing to reinstate, and by delaying the reinstatement of, unfair labor practice strikers on their unconditional offer to return to work, the Respondent has violated Section 8(a)(3) and (1) of the Act.

7. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gas Spring Company, Colmar, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 14, 1989

JAMES M. STEPHENS, Chairman

MARY MILLER CRACRAFT, Member

DENNIS M. DEVANEY, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

JD-162-87
Colmar, PA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 4-CA-16038
and 4-CA-16157

GAS SPRING COMPANY

and

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS LOCAL UNION NO. 1612

William E. Slack, Jr., Esq., of Philadelphia, PA, for the General Counsel.

Thomas G. Greaves, III, Esq., and *James Miles, Esq.* (*Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, P.A.*; *Vereen A. Dennis, Esq.*, on the brief), of Greenville, SC, for Respondent.

William T. Josem, Esq. (*Markowitz & Richman*), of Philadelphia, PA, for the Charging Party.

DECISION

Findings of Fact and Conclusions of Law

BENJAMIN SCHLESINGER, Administrative Law Judge: On 1 July 1986,[1] the employees of Respondent Gas Spring Company commenced a strike. The issues

[1] All dates refer to the year 1986, unless otherwise stated.

presented herein are whether the strike was caused by Respondent's alleged unfair labor practice and whether, upon the employees' notification on 6 October that they would discontinue the strike and their request for immediate reinstatement, Respondent was obligated to rehire them, replacing any employees it hired in the interim. Respondent denies that it violated the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., in any manner, insisting that the strike was economic, that it had the right to replace its employees, and that it had no duty to reinstate them until there were vacancies in its complement of current employees.[2]

Jurisdiction is conceded. Respondent admitted that it is a New York corporation engaged in the manufacture of hydraulic springs at plants located in Colmar, Pennsylvania, which is the location of the instant dispute, and Gastonia, North Carolina. During the year preceding 5 December, Respondent sold and shipped goods and materials valued in excess of $50,000 from its Colmar plant directly to points outside Pennsylvania. The testimony of James Zerby, Respondent's vice-president of finance and administration, muddied the waters somewhat; he testified that Respondent was not a separate corporation but was a division of Fichtel & Sachs Industries, Inc., a New York corporation. In any event, I conclude, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor

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[2] The relevant docket entries are as follows: International Union of United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and its Local Union No. 1612 ("Union") filed an unfair labor practice charge in Case 4-CA-16038 on 19 August and a complaint issued thereon on 8 October. On 23 October the Union filed its charge in Case 4-CA-16157, and on 5 December the Regional Director for Regior 4 issued an order consolidating that Case with Case 4-CA-16038 and a consolidated complaint. The hearing was held in Philadelphia, Pennsylvania on 28-30 January and 9-10 February 1987.

organization within the meaning of Section 2(5) of the Act.

An affiliate of the UAW has since 1975 [3] represented and been recognized by Respondent as the exclusive bargaining representative of Respondent's employees in the following unit which is appropriate for bargaining within the meaning of Section 9(b) of the Act, and, by virtue of Section 9(a) of the Act, the Union has been and is the exclusive representative of the following unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees of Gas Spring Company at its Colmar, Pennsylvania plant, excluding office clerical personnel, lab technicians, engineers, guards, and supervisors.

The latest collective-bargaining agreement was effective from 1 July 1983 to 30 June 1986. The Union and Respondent commenced negotiations for a new agreement on 6 June 1986 and, prior to the strike, met on eight other days in June.

Respondent engaged in hard bargaining, making more than 30 demands which, overall, would have reduced its labor costs. Its initial proposals included not only no wage increase but also the reduction of wages by eliminating a previously granted cost-of-living increase for employees hired before 1 July 1983.[4] It also proposed to reduce wages by eliminating a 10 cents per hour payment to set-up employees and its obligation to pay for two days when an employee was sick. Respondent sought to shift the burden for health benefits to its employees

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[3] A different local of the UAW represented the employees prior to October or November 1983, when that local merged into the Union. Respondent voluntarily recognized the Union following the merger.

[4] In prior negotiations, cost-of-living increases were not granted to employees hired after 1 July 1983.

by requiring them to pay a share of the insurance premium;[5] and, in addition, it sought to increase the deductible for which no benefits would be paid. It proposed that the amount and length of disability benefits be reduced. It proposed to increase the eligibility requirements for vacations and holidays to penalize those employees who had poor attendance records. As might be expected, the Union's position was quite different: it proposed a three-year agreement, yearly increases of wages, and a variety of better benefits and protective provisions in over 30 categories of terms of employment.

The instant dispute centers not on the substance of the parties' proposals but whether Respondent based its proposals upon a claim of an inability to pay: if so, Respondent would be required to comply with the Union's alleged demands that Respondent open its books so that the Union could ascertain whether Respondent's claim was legitimate. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Clearly, near the beginning of negotiations, Respondent did not make such a claim. On 13 June, Bob Liney, Respondent's director of human resources for its Colmar plant and principal spokesman at the negotiations, was reviewing Respondent's proposals. Frank Hannings, then the Union's principal spokesman, asked Liney whether he was claiming that Respondent was in dire financial straits. Liney replied that, although Respondent's health was not particularly good, Respondent was not claiming that it was in dire financial straits or claiming an inability to pay, although it had a bad year in 1985 and the first five months of 1986 had been worse than 1985.[6] Hannings then stated that, if

[5] Employees were to pay monthly $6 for individual and $16 for family coverage.

[6] Curtis Langdon, Respondent's operations manager of the 3-11 p.m. shift, who was present at all negotiations, confirmed that Liney stated that the health of Respondent was not good and had not been good throughout 1985 and the first half of 1986, but Respondent was not claiming a financial inability to pay.

Respondent were claiming dire financial straits, the Union would have access to Respondent's books and records. Liney said that "we are not claiming an inability to pay . . . [W]e are proposing not to pay. We choose not to pay." John Ruane, a member of the employee negotiating committee,[7] then commented to his fellow negotiators that Liney was saying that Respondent can pay, but it just did not want to.

At the next negotiating session, on 17 June, Liney told the Union that it would not make sense[8] for Respondent to increase its employees' wages, explaining that Respondent's sales had dropped from $60 million in 1984 to $52 million in 1985 and were projected at $48 million in 1986. Thus, what began on 13 June as Respondent's position that it could afford increases but did not wish to grant them slowly evolved into a discussion of the reasons why it offered no increases and proposed concessions, and the principal factual issue is how far Respondent went in its exposition of its reasons and whether it crossed the line from "we choose not to" to "we can't."

This proceeding is particularly difficult because no witness' recollection of a particular negotiating session wholly jibed with another's. In my recital of the facts, I have given primary credence to statements and admissions against interest. Those would appear to be truthful on their face because the witness would not have related them if they were not in the interest of the party whom the witness represented. I have particularly credited narrations of statements made at negotiations when there was corroboration from one of the negotiators on the other side of the table. However, when the testi-

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[7] In addition to the Union's officers who participated in the negotiations, five employees, members of the "employee negotiating committee," also attended the negotiations, but their participation was minimal.

[8] Liney's notes state "good business sense," but Liney did not testify to those words.

mony was clearly self-serving or beneficial to the party whom the witness represented, I have taken a harder look. It appears, for example, that Joe Sinni, the Union's financial secretary-treasurer and business agent, related too many occasions when he or other Union representatives recited to Respondent UAW's policy on bargaining for concessions, which policy provided that the Union would bargain only when the employer produced proof of its financial distress. Liney and Zerby, on the other hand, were expansive in their recitals of the number of times that they advised the Union that Respondent was not claiming an inability to pay.

With some qualifications, I have credited witnesses who related their own participation in the negotiations, particularly when their comments led to discussions with others; they would have recalled best what they said and the responses given to them. Sometimes, other participants related matters omitted from the presentations of those who were speaking; where probable, I have added the material which the speaker forgot he said. There are specific findings of fact which vary from the testimony of one or more witnesses. I have not discussed the specific reasons for all those findings because many were caused merely by the witnesses' inaccurate recollections or understandings, rather than purposeful misstatements. I found no witness utterly without fault and have weighed each witness' demeanor carefully. In addition, I have thoroughly reviewed the notes of the negotiations kept by the various participants. These notes have been helpful, but not necessarily determinative, in ascertaining the content of the negotiators' comments, because even the notes are inconsistent. Finally, although the nature of collective bargaining is often unpredictable and sometimes improbable, probabilities form the basis of these factual findings, and I have been guided by the principles set forth in *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1961).

On 20 June, Sinni entered negotiations and soon became the Union's principal spokesman. At one point on 20 June, Sinni mentioned that the employees were concerned that Respondent intended to shut the Colmar facility and move all operations to Gastonia. Liney assured Sinni that Respondent intended to maintain both plants, although he added that the Colmar and Gastonia plants were "to some extent" in competition and that it was important to make Colmar as competitive as possible.[9] In an attempt to understand whether Respondent was serious about its demand for concessions, Sinni asked Liney to meet later for dinner. Then, according to Liney, Sinni asked whether Respondent was, indeed, serious and Liney said yes, that Respondent was doing "badly" and that "we felt it was not practical to make any increases." Sinni's version of the dinner conference was different and more detailed. In answer to his question, Liney said that Respondent's demands for concessions were "real". Sinni told Liney that he did not believe that the membership would accept concessions and asked whether Respondent would extend the agreement and continue to bargain. Liney said that that was not possible, that Respondent needed concessions and concessions were required, and that the demands for concessions would be on the table at the end of negotiations. Sinni then explained that the UAW had a procedure to follow when employers asked for concessions: the Union needed proof that a company was losing money and, once there was proof, the Union

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[9] Respondent's brief emphasizes that one of the principal reasons for some of its many demands for concessions was that its plant in Gastonia operated under rules and practices which made its Gastonia facility more productive and efficient than Colmar's. Although there is unrebutted testimony that Liney discussed Respondent's feelings with Sinni in early May, this statement on 20 June and one at the 24 June breakfast meeting appear to be the only occasions in June when Liney indicated that Respondent was merely attempting to obtain some parity of efficiency in its two facilities. Otherwise, the reasons expressed by Liney and primarily Zerby on the economic proposals were wholly financial, based solely on Colmar's needs.

would then bargain for a survival agreement.[10] Liney responded by repeating that Respondent needed the concessions and that the demands would be "on the table at the end."

Sinni's reaction to this dinner meeting prompts me to believe that his narration of Liney's harder position—that Respondent "had to have" the concessions rather than the "impracticality" of granting increases—was more credible;[11] and I accept Sinni's narration. He testified that, as a result of this conversation, he believed that the situation was very dangerous, that Respondent's demands for concessions were real, and that Liney was not bluffing. He told Union president Joe Ashton as much, and Ashton asked that they meet with Liney. As a result, prior to the scheduled 24 June full bargaining session, Sinni and Ashton met with Liney for breakfast. Ashton asked Liney to relax Respondent's demands for the 30 cents cost-of-living take back, elimination of the additional 10 cents per hour payment to set-up employees, and certain concessions regarding medical benefits. Liney replied that there was no relief; that Respondent was serious about concessions which were required and necessary; and that Respondent lost money in 1985 and, in 1986, it was "heading in the red," and Respondent felt it was necessary for the Colmar plant to be as economically efficient as Respondent's facility in Gastonia. Ashton said that the Union did not desire to strike, but wanted to do every-

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[10] Liney and Zerby denied that the term "survival," in the context of bargaining or an agreement, was used; but I am convinced that, among the Union's numerous demands for Respondent's books and requests for Respondent's help in order to convince the Union's membership of Respondent's reasons or need for concessions, mention was made of a survival agreement.

[11] I also agree with the argument of counsel for the General Counsel that, even crediting Liney's recollections, he linked Respondent's demands for concessions with its poor financial condition. It would have been equally consistent for Liney to have continued with his argument that the concessions were required.

thing possible to reach an agreement. He thought it strange that Respondent would wait until just two weeks before the expiration of the contract to demand such major concessions, he believed that the membership would not accept concessions, and he asked Liney, as Sinni had done four days before, about the possibility of Respondent's extending the agreement and continuing with negotiations. Again, Liney rejected the proposal. It was not possible and concessions were necessary, giving two reasons: first, Respondent was losing money and, second, Respondent was not making as much money as it should.

Ashton told Liney that, if Respondent was losing money and if it needed help, the UAW had a procedure for survival bargaining, told him what that procedure was, and said that survival bargaining had been conducted with two companies in the area, as well as Chrysler.[12] Liney did not respond directly, but merely said that he needed the concessions and that the concessions were real.

At the bargaining session which followed on 24 June, Sinni stated that the Union would not accept substantial reductions in wages and benefits and wanted substantial increases because Respondent was a profit-making entity. Liney replied that Respondent was not in good shape, that 1985 had been a bad year and 1986 was worse, and that it was important that "everyone see the problem the company was in money wise [or] understand this." Liney also stated that the automotive industry was not having good times and that the Union negotiators should not delude themselves, that conditions were bad and were getting worse. Sinni then countered that the Union had received no indication or documentation that Respondent was in financial difficulty, although the Union understood

[12] Sinni said that it was he who mentioned the UAW procedures, but I found Ashton's recollection particularly detailed, rational, and credible. In any event, Liney did not deny that the UAW procedures were mentioned.

that Respondent's position in the market was not good.[13] Sinni added that if Respondent was losing money, Respondent should show its books so that the Union could help Respondent.[14] Liney did not respond.

On 25 June, Liney and Sinni met privately in the hall of the motel where negotiations were being held. Liney recalled that he talked with Sinni after negotiations had finished for the day and that Sinni said that he did not want the employees to lose their jobs. Liney agreed with Sinni, adding that that was the reason for Respondent's overall stance in negotiations. Liney pointed out the sit-

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[13] Langdon could not recall that Sinni made the second part of this statement. However, considering Liney's earlier response, which Langdon admitted and are in Langdon's notes, it is probable that the entire statement was made, and I credit Sinni's testimony.

[14] Strangely, Sinni did not testify to this, but Liney conceded that Sinni said it. (Langdon recalled that on three occasions, Hannings or Sinni stated that if Respondent was in dire straits, it should produce its books and the Union would bargain for concessions. It is clear that the Union frequently asked for Respondent's books to prove its financial condition—dire straits or lack of profitability—and Respondent never favorably replied.) Zerby also recalled that Liney answered Sinni that "business conditions were not good," but he had not said and was not then saying that Respondent could not afford increases, but was saying only that he felt that the grant of increases was not a prudent business move. Liney testified that he again stated that Respondent was not pleading an inability to pay, which is noticeably absent from anyone's notes of the negotiations, except Liney's where it appears to be squeezed in immediately before the meeting adjourned. (I note "squeezed" because most of the rest of the colloquy written by Liney was double-spaced, and this note was inserted between two lines.) No one corroborated Zerby's recollection of "prudent business move", and Langdon's notes, which are much more complete than Liney's, not only omit this alleged statement but also indicate that, if Liney had made the statement, it would have been completely out of context, because the parties were discussing the fact that they had agreed to reserve the discussion of economic issues until later in negotiations, only after they had agreed upon non-economic items, and time was growing close. As a result, I do not credit either Zerby or Liney.

uations at some other companies in the area, particularly Budd, Mack Truck, and FMC, where plants had either recently closed or curtailed their operations as a result of their financial condition; and Liney did not want Respondent ultimately to be in a situation similar to those companies "that had over a course of years developed some problems."

Sinni's version of this conversation was quite different as to both the timing and the content. He recalled that the morning session of negotiations consisted of Liney's recital of Respondent's position on its and the Union's demands, to wit, rejections, modifications, and resubmissions, with appropriate comments. Sinni then asked for a recess, because he felt that the Union needed to prepare a comprehensive modification of its proposals. The recess lasted for three and one-half hours, and towards the end of the recess, Liney telephoned Sinni and asked him to meet. They did, and they discussed the advisability of bringing in a federal mediator. Sinni said that the Union was prepared to make major modifications and "some unprecedented moves on economics" and restated the Union's lack of information indicating that Respondent was losing money and that, if it was, the Union needed proof to justify Respondent's proposals. Sinni and Liney then discussed certain of Respondent's proposals, and Sinni asked for relief. Liney declined, stating that the concessions were necessary and that the Union was not paying attention to what was going on—FMC, located around the corner from Respondent, had gone out of business when its concessions were not granted—and Mack Truck and Budd Company had taken on the UAW for concessions and wanted them. Liney insisted: "[L]et's face it, the time is right. We're going to take you on. Now is the time."

The parties then returned to the bargaining table, and Sinni presented the Union's new proposal which, he said, represented a "major modification" as a show of "good

faith" to get Respondent to move.[15] He said that the major issues on the table were Respondent's demands for concessions, that the Union had no indication that Respondent was losing money, and that the Union would help, but it needed proof "because our membership just would not accept the fact that they were losing money. They just would not believe that." Otherwise, the Union would not concede the loss of $1.50 per hour in wages and benefits. Sinni could not remember what Respondent's response was, but recalled that he told Liney that Respondent was not in dire financial straits and Liney replied that Sinni was correct and "we are going to run this company in a prudent way." [16]

Early in the bargaining session of 27 June, Sinni made an extended speech, in which he said that the Union had checked out Respondent and ascertained that it had sales of $58 million in 1984 and profits of $42 million in 1985 (undoubtedly a slip of the tongue) and was viable, profitable, and able to grant increases and that the Union wanted a "piece"; that unless Respondent came up with a decent package, the Union would recommend a strike to its membership; and that Respondent should show the Union its records so that the Union could determine if Respondent was in financial difficulty. Liney responded,

[15] Because this "major modification" was presented after the break and because Liney agreed during the later session to consider the involvement of a federal mediator (he indicated that he had talked with Ed McMahon, the mediator who ultimately intervened), Sinni's recollection of the timing of his discussion with Liney is more probable and I credit it, being convinced by Sinni's more detailed testimony.

[16] See footnote 14 above. This may be the meeting to which Zerby referred when Liney used the word "prudent." Indeed, I have grave reservations that Zerby heard very much of what transpired on 24 June. Langdon's notes indicate that that session ended at 3:30 p.m. Zerby's one-page notes indicate a time, "15:20 on 24 June 86," and nothing written above it agrees with any of the negotiating notes. (It was stipulated that the notations at the top of Respondent's Exhibit 3-A were not notes of the negotiations.)

according to Sinni, that he did not agree with Sinni's numbers; according to Liney, that he heard what Sinni said and that just because Liney did not object, that did not mean that he agreed.

At this point, the parties took a lengthy break, after which Zerby delivered some lengthy comments, about which there are only few, but critical, differences in the recollections of the negotiators. Zerby rejected Sinni's claim that Respondent was trying to bust the Union, stating that Respondent's principal negotiators and president had bargained with the UAW for many years, there had been no management change that would suggest that their views had changed, and the German owner of Respondent was used to working closely with unions.

Zerby said that Respondent's negotiating position was caused by its "financial condition" or by economic "considerations" or "conditions". He agreed with Sinni's comments that Respondent's profits had been at an all-time high in 1984, with sales of a little less than $60 million, but 1984 was the only year that Respondent had enjoyed profits which were above the average for manufacturing companies. That resulted from a one-time retrofit program (the production of a kit to fix the gas springs which aid in the opening and closing of trunks of cars) which Respondent contracted with General Motors in mid-1983. The program lasted through the end of the first quarter of 1985. In 1985 Respondent's business had taken a downturn,[17] 1985 sales were down 15 percent from 1984 and profits were down 70 percent, 1986 had been worse than 1985, and Respondent had been losing money throughout

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[17] Zerby testified that he told the Union negotiators that Respondent had made a profit in the first quarter of 1985 and had broken even the last nine months. Although Sinni's recollections were inconsistent, Sinni confirmed this at one point during his testimony, but maintained that Zerby had explained that 1985 was "at best" a break-even year. Liney had said earlier that 1985 was a "bad" year and 1986 was "worse."

1986, emphasizing that "there were no profits" and "the bottom line is red." According to Langdon, Zerby added that the bottom line would remain red, that Respondent was determined to take action to reverse its losses, that Respondent was liquid and was able to meet its obligations, and that Respondent "cannot contend with the continued downward trend in business or jobs will be lost." Sinni's and Zerby's testimony differed somewhat from Langdon's. Sinni conceded that Zerby had said that Respondent was not in dire financial straits.[18] Zerby recalled saying that 1986 had started even worse than 1985, that sales would be down again in 1986, that there are no profits in 1986, that Respondent started the year losing money and continued to lose money, that a loss was projected for the year,[19] that losing money was not a tolerable situation and had to be addressed, that losing money was the reason for Respondent's position at the negotiating table, that Respondent did not presently have a liquidity problem and could meet its obligations to its employees and vendors, but Respondent was in a situation where it had to control and reduce its costs, and that Respondent was determined to achieve those reductions.[20]

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[18] Sinni's notes so indicate, and Sinni recollected this statement after being confronted with his notes. No other witness corroborated this testimony, but the notes of employee negotiating committee member Sylvia Plant state: "dire straits NO liquidity downhill losses can't continue." But see footnote 19 below.

[19] Plant's notes regarding this statement of Zerby reflect "No profit 86 looking worse sales low." Hannings' notes state: "85 downturn 86 substantial downturn—lower than last year profits Red all year have liquidity—meet payroll—bills customers lose money—going downhill—lose jobs—I want to do my job."

[20] Liney claimed that Zerby specifically disavowed, in those words, any "inability to pay" and never mentioned the possible loss of jobs. I discredit the latter testimony, finding no corroboration in the record for this apparently self-motivated statement. Indeed, Zerby admitted offering a "basic truism," that if any entity, Respondent included, loses money indefinitely, the result would be a loss

Zerby then proceeded to criticize the Union's negotiating committee for not properly representing the best interests of the employees, for being amateurs and irresponsible, and for not really understanding what was going on. If the committee really wanted to, it could, Zerby argued, sell Respondent's proposal to the membership.

On 28 June, the Union held a membership meeting at which Ashton spoke, telling the assembled 200 employees that negotiations were going poorly, that Respondent had made many proposals for concessions, that the Union felt that Respondent was a profitable facility, but Respondent's controller (Zerby) insisted that Respondent was losing money and needed concessions, and that Respondent was doing everything to thwart the making of an agreement by putting advertisements in the paper to hire employees. He said that Zerby had stated that Respondent had lost money in 1985 and that it was losing more in 1986 and there was a downward trend in the automotive industry. Employees questioned who Zerby was, complained that he was never in the plant and knew nothing, called him obscenities, and said that they could not believe that Respondent was not profitable, waving copies of a newspaper article in which it was reported that Respondent had an 80 percent share of the market and enormous increases in revenues.

Sinni then read and explained Respondent's proposals for concessions, as well as the Union's proposals. He repeated that Zerby had said that Respondent was losing

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of jobs and deterioration of its business. For the same reason, I also do not credit Liney's testimony about Zerby's specific disavowal, which Zerby never testified to or mentioned in his investigatory affidavit, which Liney had read and indicated in a letter to the Board's Regional Office that he agreed with Zerby's recollections. However, Liney could have construed Zerby's comments about Respondent's liquidity and not being in dire financial straits as having the same effect as a claim of an ability to pay. In any event, both Liney and Zerby agreed that Zerby said on 30 June that Respondent "was not in a position to commit to a pay increase."

money, that 1985 had been a bad year and 1986 was worse, that it was running in the red the entire year, and that Respondent was willing to agree to a contract only with no wage increase and with "take aways." There was a big outburst, Sinni testified, of people yelling obscenities, that the company was lying, and that it was profitable and would not share its profits with its employees.

Whether and in what context the Union's demands for Respondent's books and records were mentioned was the subject of diverse recollections. Ashton testified that Sinni mentioned that, on several occasions, he requested that Respondent, if it was losing money, should show the Union its books and the Union would discuss concessions. Sinni recalled that Ashton made some mention of Respondent's books being opened. Ruane, admitting that he did not recall all that Ashton said, recalled that Ashton stated that he felt that Respondent was making money and thought that it could afford increases, but Zerby said that Respondent was losing money, and that the Union was willing to negotiate concessions, if the Union could see Respondent's books. Employee Karen Walker did not recall that Ashton spoke on 28 June, recalled that Hannings spoke (Hannings denied it), and recalled that Sinni suggested that the employees turn down the contract because he thought Respondent could do better than what they were offering. Sinni, she recalled, believed that Respondent should show the Union its books, so that the employees could see for themselves; he did not believe that Respondent was telling the truth; and he stated that the Union wanted to see the books. Walker also remembered that she commented that she could not understand why Respondent could not grant any increases, when it had purchased new machinery for the Colmar facility and had commenced operations of Gastonia. Walker, despite numerous attempts to refresh her recollection, could recall little else, including the reason why it was necessary for the Union to see Respondent's books. Thomas Desko, the Union's shop chairman, recalled that, because Sinni was late, Ashton explained

Respondent's position in some detail, to wit, that Respondent was losing money and needed concessions. When Sinni arrived, he repeated Respondent's claim of losing money and needing concessions, but Desko mentioned nothing about any Union demand for Respondent's books and Respondent's refusal.[21]

The meeting continued, according to Sinni, with Frank Redmiles, UAW assistant area director, who explained the UAW procedure that, in order for the Union to grant concessions, Respondent should share with the Union proof that it was losing money, and the Union would then substantiate that and grant concessions or a survival agreement. He said that the employees would decide on 1 July whether to accept or reject whatever Respondent's proposal was then. Ashton's recollections were different. He testified that Redmiles felt that Respondent was a profitable company, but Zerby said it was not. Redmiles continued that a strike was difficult, that neither he nor Joseph Ferrara, UAW area director, sought strikes, but the UAW would back up the members and use whatever influence it had with its Ford, General Motors, and Chrysler departments.[22] Individual members of the employee negotiating committee then spoke, ending with Harry Yoo, who read in Korean the parties' proposals which were still pending.[23]

Prior to the 30 June negotiating session, the federal mediator asked the principal negotiators, Liney, Zerby, and Langdon, for Respondent, and Sinni and Ashton, for the Union, to confer separately. Sinni reported that the Union had held its 28 June meeting, that he had indicated

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[21] Credibility resolutions will discussed below, at pages 15-17 [sic].

[22] Sinni recalled, however, that Redmiles or someone else said that the Union would go to UAW president Owen Bieber or Douglas Fraser to influence Chrysler.

[23] Respondent employed about 30 employees who spoke only Korean.

Respondent's feeling that they would accept concessions, but the members were unwilling to accept them. Ashton said that the Union's information suggested that Respondent was profitable and it was unfair for it to require its employees to accept wage and benefit reductions. Zerby was upset with the results of the Union's meeting, stating that the Union was misleading its members by continuing to represent that Respondent was profitable, when it actually broke even in the last three quarters of 1985 and was in the red in 1986 and, because there was a downward trend in the automobile industry, Respondent would continue to lose money. He believed that the employees would accept austerity for one year and added that Respondent "had to" or "must" have cost containment and "could not commit to a pay increase."

That Zerby also used the word "afford"—both Sinni and Ashton testified that Zerby said that Respondent could not afford to give increases to the employees—was uniformly denied by Respondent's witnesses. In resolving this issue, I note Langdon's implausible denial that Zerby said (as Zerby admitted in essence, he said), that Respondent "could not commit any money to increases." Langdon's notes indicate almost that very quote,[24] which Langdon attempted to explain away by stating that he was taking notes of the comments made by not only Zerby but also Ashton, Sinni, and Liney, and "it was quite difficult to keep with the flow of the conversation." I found Langdon unpersuasive; indeed, he conceded that Zerby is "very, very slow and deliberate in the way he talks," which would make it much easier for Langdon to take accurate notes of at least Zerby's comments. However, Langdon tried to imply that there was a rapid and heated

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[24] Langdon's notes state that, in response to Ashton's argument that it was unfair to propose "take aways" when Respondent was "profitable," Zerby stated: "We cannot commit $ inc. We are losing $." Langdon did not believe that Zerby used the word "commit," but admitted that Zerby said, as Langdon's notes indicate, that Respondent "must have cost containment."

exchange of statements made, but that was inconsistent with his further explanation that Zerby spoke so slowly that Langdon wrote the word "afford" because he "got ahead of [Zerby] and put words into his mouth . . . I was anticipating what was going to be said." [25]

The following is the portion of Langdon's notes of the comments which he attributed to Zerby:

[Handwritten notes omitted in original printing of opinion.]

Again, Langdon insisted that he "got ahead of" Zerby, who Langdon testified, did not say "afford," but said only that Respondent "would not commit to a long term contract." I do not believe Langdon, who, although admitting that various statements relied upon by General Counsel were made (indeed, he could hardly deny them when his notes so clearly indicated that the statements had been made), appeared hesistant in his admissions and reluctant to commit himself to positions that might be harmful to Respondent's cause. I find that Langdon heard the word "afford" but was not able to keep up with the statement that was connected to the word. He then crossed it out and made other revisions to replace it with a later statement that was being made by Zerby. I, therefore, find that the word "afford" was used by Zerby and discredit all testimony to the contrary.

In what context the word was used creates a different question. Again, the recall of the Union's witnesses was not uniform. Sinni stated that Zerby said that Respondent had to have cost containment and "couldn't afford to give increases to us." I do not believe that Zerby stated his position that openly. Rather, I find that, in answer to Zerby's statements about Respondent's need to contain

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[25] Respondent's brief argues that Langdon's anticipation was caused by his inexperience as a "first-time bargaining participant," a contention which I find unpersuasive.

costs, Ashton suggested that, if Respondent were talking about economics alone, it ought to at least give its employees some job security by agreeing to a three-year agreement. Zerby responded: "[H]ow could we go back with a three year agreement, when the company can't afford to give people raises in the first year [of an] agreement, they surely couldn't give them raises in the second and third year of the agreement." [26]

The remainder of the morning session included Sinni's request to Respondent to open its books "if the company was losing money" and Ashton's plea that neither side needed a strike, that it was "a no-win situation for both of us," and that "it's a war" and, if there were a strike, Ashton would do everything possible with the UAW's Chrysler, General Motors, and Ford departments to influence those companies' dealings with Respondent. The parties then recessed for private caucuses.

The parties later returned to the bargaining table, the Union modified its proposals, and Respondent presented its "final offer" of, among other things, a one-year agreement with no wage increase. A recess was taken for the Union to consider it, and negotiations then resumed with the Union having added Redmiles and Ferrara to its negotiating team. Sinni rejected Respondent's final offer in its entiretly and said that the Union would recommend to

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[26] In making this finding, I have not credited Zerby's assertion that he read from written notes (Respondent's Ex. 2). I found his testimony about reading the notes contradictory and inconsistent, whether he read them, as he originally testified, or used them as reminders of what to say. I do, however, find that he said that Respondent could not commit to pay a wage increase because it was losing money and it intended to control its costs and that Respondent intended to maintain its production facilities at both Colmar and Gastonia, as his notes reflect. I also note Langdon's inconsistent testimony in which he first stated that Zerby had linked Respondent's failure to consider a long-term contract because of money losses and a downward trend in Respondent's profitability and then he denied this linkage. Then, Langdon agreed that Zerby gave the perception of basing Respondent's demand for a one-year contract on the loss of money and unpredictability of profits.

the membership that they do likewise. Sinni said that the Union was willing to sit at the table and continue bargaining into the next week, if necessary, to reach an agreement. Ferrara said to Liney that if he thought the Union was a weak group, it was not, it was strong, and accused Respondent's negotiators of not having "moved from day one on your package." Liney said that Respondent had moved significantly, and Ferrara replied that, "if you are losing money, show us your books and we will bargain concessions." Otherwise, the Union was going to give Respondent "a war, a legal war." Redmiles added that Respondent was not being fair with the employees and that the Union's information was that Respondent was profitable.

Zerby responded that Respondent was losing money and that the automotive industry was in a downward trend. Redmiles thought that the expenses of the Gastonia facility was draining the Colmar facility. One of Respondent's negotiators (probably Zerby) assured that that was not the case, that there was a downward trend in the entire auto industry. Ferrara took exception with Liney's having raised with Sinni the problems of Mack Truck and Budd, which had nothing to do with Respondent; and he said that he had been involved in the union movement for 45 years, he had negotiated many contracts, and if a company was in serious need and required concessions, he would bring in actuaries to check the books in order to justify those concessions, which he said he had done on numerous occasions. Sinni said that he had repeatedly requested Respondent to open its books, and his pleas had been ignored. Ferrara added that Respondent's demand for a one-year contract was most difficult to sell to the employees, because if you can sell concessions, there is no job security with that short a term. Liney said that Respondent might be able to move some things around in its offer as long as the total package was not changed. Ferrara was furious, stating that there was no way Liney could move things around in a one-year contract with no

wage increase, because there was nothing there to rearrange.

Zerby then made a comment about a three-year agreement, about which there was much conflict. Langdon recalled that Zerby asked the committee whether the employees would accept a three-year agreement without an increase, adding that Respondent was losing money and "could not consider any wage increases as part of a three year contract because it did not expect its financial situation to improve." Sinni testified that Zerby asked Ferrara: "[W]ould your people accept a three year contract with no increases. We've already informed you that we can't afford to give raises," which Ruane corroborated in essence. Ashton recalled that Zerby said substantially the same thing that he said that morning, that if Respondent could not afford an increase in a one-year agreement, it could not afford an increase in a three-year agreement. According to Langdon, Sinni responded that Respondent had not shown the Union that it was losing money [27] and accused Respondent of not being truthful. According to Sinni, Ferrara responded to Zerby: "Show us the books"; and Zerby said "We're losing money." Zerby replied, in answer to qualms expressed in earlier statements by the Union's negotiators, that Respondent had no intention of moving south (to Gastonia and closing its Colmar facility) and that Respondent wanted "to remain viable."

Zerby denied that he ever said that Respondent could not afford to grant increases. It was his and Liney's contention that the Union's request for a three-year contract prompted him to argue that if the Union's membership would not accept a one-year agreement with no wage increase, in no way would the people accept a three-year agreement with no increase, a position substantiated by Desko. That appears to be a logical position and more probable than the testimony of the various other Union

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[27] Langdon testified that Sinni made this statement several times.

negotiators.[28] In light of the fact that no one's negotiating notes indicate that the word "afford" was uttered in this later session, the inconsistency of the testimony, and Desko's support of Respondent's position, I find that none of the statements attributed to Zerby linking the denial of increases to affordability should be credited.

The Union held a ratification meeting of about 250 employees on 1 July. Ashton testified that he again opened the meeting and explained that Respondent's proposal that had been discussed on 28 June remained the same; that Respondent had told the Union negotiators that it was losing money, that it had lost money in 1985[29] and was in the red all of 1986; but the Union had information that conflicted with Respondent's position, that Respondent was profitable in 1984 and 1985, and that, when Respondent was asked to open its books to substantiate its claim that it was losing money, it refused. Sinni testified that, when Respondent's claim that it was losing money was announced, there was "[a] lot of cat calling; there was a lot of screaming, . . . like that's not true; that's bullshit; they're making money and we know it." Sinni testified that Ashton proceeded to speak about some of the outstanding proposals, but Ashton said that he did not get into real details about the proposals, leaving them to Sinni. Redmiles then spoke, telling the employees that it was a sad day, that Respondent had made little or no movement from the beginning of negotiations, and that, although he thought that Respondent was profitable, it refused to show its books. The ultimate outcome was in the hands of the

[28] The notes of the negotiations lean to this finding. Hannings' notes attribute to Zerby: "3 Yr Agrm No W. Inc.—Your Peopl. Accpt." Langdon's notes state: "Would your ppl have accepted 3 year—0—money."

[29] Although I find that this representation was made to the membership, I find that it was not accurate, but probably indicated what the Union negotiators thought that Respondent was arguing, derived from Liney's statements that 1985 was a bad year.

employees, and, whatever the outcome, the UAW would support them.

Sinni then read Respondent's last offer, copies of which had been handed to all the employees, explaining each issue after reading the proposal.[30] He said that it was tough bringing an agreement with so many concessions for only one year, but Respondent still refused to offer any proof that it lost money in 1985 and 1986. The floor was opened for questions, among which were: "Why no wage increase? "Why can't they afford it?" "We know they're making money." "Why are they reducing our benefits?" Some employees expressed disbelief that Respondent was losing money and was proposing no increases and, instead, concessions. Following this, Yoo translated Respondent's final proposals into Korean, the employee committee members spoke briefly, and then a vote was taken. The employees rejected the final offer, which was apparently a strike vote, by 235 to 12.

The parties' briefs raise serious questions about what occurred at the two Union meetings. General Counsel's witnesses were by no means mutually corroborative. Respondent called no witnesses to testify about the 28 June meeting and two witnesses, James Shaw and Joseph Herrschaft, to testify about the 1 July meeting. Although both denied recalling that anyone from the Union commented about Respondent's books and records or financial information, neither recalled much else about the meeting. Herrschaft, when asked about what comments were made by Union officials about the different proposals, answered: "I don't recall anything too much about it." While admitting that various Union officials

[30] By the end of negotiations, Respondent had reduced its proposals to about 18. Still remaining to be resolved were, among others, its demand for a one-year agreement with a wage freeze, elimination of progression increases, higher insurance deductibles (although reduced from its initial proposal), employee contributions for health insurance, and modifications in the amounts of disability benefits.

spoke, he candidly conceded that: "I didn't pay too much attention to really what was going on. I was interested in what they're going to do about the contract." Shaw's memory was equally dim, relating in only a few pages of testimony what he recalled about a two-hour meeting. Specifically, all he could recall was that Sinni went through the proposals and said that the one-year contract was a problem and that Respondent was going to move south. Like Walker, Shaw recalled that Hannings spoke at the meeting, but Hannings specifically denied that he did.

On the other hand, the testimony of the employees called by counsel for the General Counsel was no model of consistency or total recall. Perhaps, the lack of recollections was caused by the nature of the event. Purposefully putting oneself out of a job and on strike, with the hardship of loss of income and lack of support of one's family, is a wrenching decision and undoubtedly causes the mind to wander. The reading of contractual proposals and how they would affect the individual employees may have diverted their attention from some other matters.

There is a temptation, when so many different narrations are given about the same events, to disregard all of the testimony as purely fiction, perhaps even purposeful fabrication. However, although the witnesses had either a personal or institutional reason for fabrication, I did not view the employee witnesses as malevolent or purposefully attempting to mislead. Rather, they were sincere in trying to remember what happened as best as they could, although their individual recollections were as diverse as they could be. Nonetheless, there is a theme that pervades all their testimony.

I have no doubt that the Union spelled out in some detail why Respondent was demanding no increases and concessions and, from the response of the members,

either from the newspaper article or simply because they believed that Respondent was a viable entity, that the members did not believe that Respondent had good cause to press its demands. Furthermore, the Union's leadership recommended rejection of Respondent's final proposal and a strike, as even Herrschaft recalled; and I thus find it probable that someone made known why the Union took that position. Ruane, who impressed me as a thoroughly sincere and thoughtful witness, testified that Ashton reported on 1 July only that Respondent claimed it was losing money and that the Union would be willing to bargain concessions if the Union could see Respondent's books. That was, in substantial part, what he recalled Ashton saying on 28 June. Omitted from that testimony was that the Union demanded that Respondent show its books and that Respondent refused, although it could be reasonably inferred that the Union had made a demand and Respondent did not comply. Walker concurred in some of Ruane's recollections about the 28 June meeting, and recalled, only after some leading questions, that the members were advised on 1 July that Respondent would not open it books, and members became upset because they "wanted to know . . . what we should do." (Walker explained that Respondent was claiming that it could not "afford things" and she wanted to have proof for herself.) Employee Henda Twyman testified only about the 1 July meeting; and she essentially corroborated Ruane's recollections. However, she recalled that it was Sinni who stated that, if Respondent put its books on the table and let the Union see its problems (or losses), he would bring it back to the members and let them know what was happening and try to work something out. Desko, who recalled that both Ashton and Sinni related on 28 June Respondent's rationale for its offer but said nothing about a demand for Respondent's books and Respondent's refusal, testified that both Ashton and Sinni related the demand and refusal on 1

July.[31] The final wrinkle comes from Sinni, who testified that on 1 July Ashton "told the membership that he asked the company to open the books to substantiate that they were losing money, and they refused"; and, on cross-examination, without explication, testified: "In the July 1 meeting I recall no mention of the [company's] books [being opened]. . . . In the June 28th meeting, I believe there was some mention of the books by Mr. Ashton." However, on direct examination, Sinni testified that he came late to the 28 June meeting (corroborated by Desko) and that, when he arrived, "Mr. Ashton was concluding his presentation." Sinni did not testify on direct examination that he or Ashton mentioned Respondent's refusal to show its books at the 28 June meeting.

It is impossible to reconcile all of these recollections but, again, there was clearly a common thread among all the credited witnesses that the reason for Respondent's proposals was that it was a losing entity, that the Union and its members did not believe that that was truthful, and that the Union might be willing to reach a different judgment if Respondent demonstrated proof of its financial status. I find that this was expressed on 28 June, but I do not find that, although it might be inferred that the Union had demanded Respondent's books and Respondent had refused, that the demand and refusal were mentioned. The only testimony which supports that comes from Ashton, who said that Sinni said it, and Sinni, who said on cross-examination that Ashton did. However, Sinni was late in arriving at the 28 June meeting, so late that Ashton was just completing his remarks. Furthermore, Sinni never stated on direct that Ashton stated this on 28 June; he originally testified

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[31] Desko, however, did not report in his investigatory affidavit given to the Regional Office that Sinni said anything. The affidavit was not introduced in evidence, and it is impossible to make a credibility finding based on what may be (or may not be) an inconsistency between his testimony and his affidavit.

that that happened on 1 July. I thus find accurate Ruane's and Desko's testimony that there was no mention of the Union's demand and Respondent's refusal at the 28 June meeting.

I also find that Sinni's answer that Ashton made this statement on 28 June was merely an inadvertent mix-up of the two meetings, and I credit his original testimony, which was corroborated by Desko, Walker (who did not mention anyone's name), and Twyman (who inaccurately named Sinni as the person who said it). I was especially persuaded by Desko, whom I have previously credited in another hotly disputed factual difference, who recalled that some five to ten employees questioned the Union's leadership about why Respondent would not open the books. Those questions, I find, were prompted by a statement that a demand had been made by the Union and that Respondent had rejected the Union's request. Accordingly, I find that all of the components of the unfair labor practice were explained to the membership and that the membership reacted unfavorably to Respondent's failure to prove its claim that it was unable to pay increases and needed concessions.

The strike commenced that afternoon, 1 July, and no unit employee reported to work that day. However, beginning on 2 July, some employees returned to work; and by 6 October, 72 employees had returned to work and, in addition, Respondent had hired 119 permanent replacements, all of whom worked under the terms of Respondent's final offer which was unilaterally implemented following the 30 June bargaining session. On 6 October, the Union made an unconditional offer to return to work on behalf of all Respondent's unit employees and notified Respondent that the strike was terminated and that all employees were prepared to immediately report for work. As noted earlier, Respondent replied to this offer that the strikers were economic strikers only, that their names would be placed on a preferential hiring list, and that they would be "offered future positions according to legal

requirements of the law." The Union thereafter denied Respondent's claim that the strikers were economic strikers.

In the meantime, the parties met on 25 July and 15 August, but there was no progress and no discussion of the Union's request for financial records. The only event of note at the August session was that Sinni read a prewritten letter advising Respondent that the employees were willing to return to work under the terms of the 1983-1986 agreement as long as negotiations for a new agreement continued for a reasonable length of time. Liney rejected the proposal. Indeed, Respondent had already hired replacements who were working under the terms of Respondent's last offer, so that acceptance of the Union's proposal to work under the terms of the expired agreement would have resulted in an increase of Respondent's labor costs.

The subject of Respondent's financial condition arose at the bargaining session of 18 September. By then, the Union had filed its unfair labor practice charge alleging that its strike had been caused by Respondent's failure to produce proof of its claimed "inability to pay"; so it is probable, and I find, that many of Respondent's statements were actually attempts to support its legal position, rather than indications of what had earlier transpired. At the beginning, Sinni said that the Union had asked Respondent many times to allow the Union to review Respondent's books so that the Union could actually determine if Respondent was actually losing money and that the Union needed this information so that it could convince the employees, who did not believe that Respondent was losing money, to accept concessions and so that the Union could determine what its position in the negotiations should be. Liney responded that Respondent had refused to show its books because it was not claiming an inability to pay, to which Sinni said that if Respondent was not claiming an inability to pay, it must

be making money and asked Respondent "to put the proof on the table that [it was] losing money." Zerby denied that Respondent was making money and said that Respondent had told the Union that it was not making money. Liney stated that Respondent was merely making a prudent business decision in deciding not to give increases and denied that Zerby had ever said that Respondent was losing money,[32] while conceding that Respondent "was not particularly profitable, and was not healthy."

Zerby then compared Respondent's position with General Motors, which was losing money but remained liquid; and General Motors asked for concessions and got them. Zerby said that Respondent was losing money and making a prudent busines decision. Sinni contended that Respondent should "put proof . . . on the table" that it was losing money and the Union would bargain for concessions. Ruane interjected that he was not a business administration major, but he could not understand how Liney could be saying that Respondent could afford increases, but not willing to grant them, while Zerby was contending that Respondent was losing money. Liney said that Zerby's explanation about General Motors explained it. Zerby explained that Respondent was able to meet its financial obligations by using its liquidity, that is, that Respondent's assets exceeded its liabilities. Ruane then asked how Zerby determined that Respondent was losing money, and Zerby answered that Respondent's expenditures were greater than its income.

A week later, on 25 September, Liney wrote to Sinni, reaffirming his position stated in the 18 September negotiations and accusing the Union of attempting to put

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[32] Langdon's notes reflect this latter statement, but Langdon nonetheless testified, without adequate explanation why his notes should so state, that he was sure that Liney did not deny Zerby's statement. According to Sinni, Liney's reply was: "[W]e told you that we're not in [dire straits]. It's not that we can't afford. It's not that we're losing money. It's just that we don't choose to pay."

Respondent in the position of saying that it "was not able or could not afford to meet the Union's economic demands." Liney stated that Respondent had told the Union "many times and in many different ways that we are unwilling, not unable, to pay, and that our position is purely a matter of business judgment and choice, rather than one of inability to afford," adding:

> From your comments, I gather you feel that "written proof" (as you call it) of what we have told you about our economic position could be *helpful* to you. That is not the test. The mere fact that such documentation might be helpful does not impose a legal obligation to present it. Along this same line, your request to have your "actuary" come in to review our books is once again denied.

NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), is the guiding decision involving a request for information to substantiate an employer's claim of an inability to pay. There, the union proposed a wage increase of 10 cents per hour; and the employer answered that it could not afford to pay such an increase, it was undercapitalized, it had never paid dividends, and an increase of more than two and one-half cents per hour would put it out of business. The union's request for evidence substantiating the employer's statements was rejected, despite the union's insistence, as here, that "such information was pertinent and essential for the employees to determine whether or not they should continue to press their demand for a wage increase." Id. at 150.

The Court stated that, although the Act does not compel agreement between employers and bargaining representatives, it does require collective bargaining in the hope that agreements will be reached; and the issue of garded by both parties as "highly relevant." Id. at 152. the employer's ability to pay increased wages was re- The Court wrote:

> . . . The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations. Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions. [Ibid.; footnotes omitted.]

The Court held that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims," and, if an argument about asserted inability to pay a wage increase is "important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." Id. at 152-153. Thus, it would "certainly not be farfetched [to conclude] that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim." Id. at 153. The Court agreed with a series of Board cases holding that if an employer "does no more than take refuge in the assertion" of poor financial conditions, refusing either to prove its statement or permit independent verification, "[t]his is not collective bargaining," but tempered its holding, as follows:

> . . . We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. [Id. at 153-154; footnote omitted.]

The Board has since considered numerous types of claims of inability to pay that will justify a union's demand for substantiation. In *Cincinnati Cordage & Paper*

Co., 141 NLRB 72 (1963), the Board held that an employer's claim that it could not remain competitive with comparable employers in the industry constituted a plea of poverty, even though the employer was not pleading a literal "inability to pay," as in *Truitt*, "because the employer expressed the view that the wage increases would lead to impoverishment." Id. at 77. In *Taylor Foundry Co.*, 141 NLRB 765 (1963), enfd. 338 F.2d 1003 (5th Cir. 1964), the Board found a plea of inability to pay when the employer contended that, if it increased its labor costs, it would lose its margin of profit and "*we can't exist.*" Id. at 767; emphasis in original. In *Stockton District Kidney Bean Growers*, 165 NLRB 223 (1967), the employer's statement Steiner, Esq [sic] employer to produce supporting data, noting that *Truitt* was "not confined to cases where the employer's claim is that he is unable to pay the wages demanded by the Union," Id. at 90, and that bargaining "is hampered and rendered ineffectual when an employer mechanically repeats his claim but makes no effort to produce substantiating data." Id. at 91. In *Stanley Building Specialties Co.*, 166 NLRB 984 (1967), enfd. sub nom. *Steelworkers Local 5571 v. NLRB*, 401 F.2d 434 (D.C. Cir. 1968), cert. denied sub nom. *Stanley-Artex Windows v. NLRB*, 395 U.S. 946 (1969), the employer argued that its cost of business had increased alarmingly, its earnings had not increased in proportion to its sales increase, and its division was not making money so that it could not pay more than it was offering and remain competitive. The Board, considering all the circumstances, found a plea of an inability to pay.

"[N]o magic words are necessary to express a [plea of financial hardship] within the meaning of *Truitt*, but the words and conduct must be sufficiently specific to link its bargaining position to economic hardship." *E.I. du Pont & Co.*, 276 NLRB 335, 336 (1985). The Board in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984), quoted with approval *New York Printing Pressmen Local*

51 v. NLRB, 538 F.2d 496, 500 (2d Cir. 1976), that: "So long as the Employer's refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the Employer in conveying this message is immaterial." In *Atlanta Hilton*, the Board found no "words and conduct . . . specific enough to convey [a claim of an inability to pay.]" (At page 1602.) There, the Board found only that the employer had characterized the union's wage proposal as excessive; generally discussed the economy, noting that unions in other industries were making financial concessions; denied and later refused to deny or confirm that the employer had made a profit; and stated that it was not necessarily true that the hotel was making money or that it was full or would stay full and that the future was uncertain. The Board found that the employer "stopped short of asserting that its own financial situation rendered it unable to afford any increase the Union proposed." Ibid.

Advertisers Mfg. Co., 275 NLRB 100 (1985), followed the rationale of *Atlanta Hilton*. The employer advised the union that it desired to discontinue payment of an end-of-the-year bonus for several reasons, including its assertion that "the level of business in the industry and for the Company has been very poor for an extended period of time, going back to at least 1980, and the expenditure under that circumstance is not warranted," its belief that more value for the dollar would be gained by investing in employee benefits or other operational expenses, and its statements that it had been considering discontinuance of the bonus for several years and, because of a recent strike, it "would rather not" confront the question of whether the bonus should be distributed to all employees. The union demanded financial information to support the employer's "level of business" contention, and the employer promptly replied that it was not pleading financial inability; and the employer made the

same reply two months later when confronted with a new union demand. The Board found that the explicit disavowals evidenced that the employer was expressing merely its unwillingness to pay rather than an inability to pay, relying on the reasons in the employer's response, other than the "level of business" justification. As to that, the Board perceived no meaningful distinction between the employer's general reference to its "level of business" and the employer's vague references in *Atlanta Hilton* to its occupancy rate and the economy in general, neither of which were specific enough to convey a plea of an inability to pay. *Buffalo Concrete*, 276 NLRB 839 (1985), enfd. in relevant part sub nom. *Washington Materials, Inc. v. NLRB*, 803 F.2d 1333 (4th Cir. 1986), also followed the rationale of *Atlanta Hilton*. There, the Board found that an employer's claim that it needed to be more competitive was not a claim of an inability to pay, even though it was accompanied with demands for concessions.[33] The Board refused to assume that an employer who no longer wishes to pay wages and benefits it once agreed to is unable to make such payments. Id. at 841.

Here, there is some evidence that Respondent was claiming an unwillingness to pay, particularly on 13 June, when Liney clearly announced that it was not Respondent's position that it was unable to pay but that it had made the business judgment that it did not desire to pay. Not so clear, but indicative of an "unwillingness" rather than a "can't" rationale, were Ashton's understanding that Liney said on 24 June that the reason for not granting increases was that Respondent was

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[33] Although this appears to be inconsistent with some of the Board's earlier decisions, the Board noted in *Taylor Foundry Co.*, 141 NLRB at 765, that "it is readily understandable that an increase in operating costs may place an employer in a disadvantageous position with respect to his competitors and that a mere assertion thereof is not necessarily a claim of inability to pay calling for some substantiating proof under *N.L.R.B. v. Truitt Mfg. Co.*"

not only losing money, but also not making as much as it should; Liney's denial on 25 June that Respondent was in dire financial straits and statement that Respondent was going to be run prudently; Liney's repetition of his denial on 27 June, the next to last negotiating session, that Respondent was in dire financial straits; and Zerby's assertion on the same date that Respondent was liquid.

Respondent contends that these statements, made in the space of less than three weeks, merely expressed a judgment that it would not grant increases and would seek concessions, not because it required them due to its inability to pay but because it was exercising prudence and being practical in the management of its affairs. But, as stated above, magic words of a professed unwillingness to pay do not necessarily lead to the conclusion, in the context of the entire negotiations, that no inability to pay is being claimed. For example, in *S. B. Mfg. Co.*, 270 NLRB 485, 491-492 (1984), although the employer repeatedly stated that it was not pleading poverty, the Board upheld the administrative law judge's conclusion that the employer's reasons for refusing all the union's demands and for proposing certain economic concessions were based on its plea of financial inability to pay or its equivalent, to wit: "Costs were increasing, inventory was increasing, sales were decreasing, orders were decreasing, the Company was in a recession, employees were working a short workweek, and the Company was in no position to agree to the Union's economic demands." Similarly, in *Celotex Corp.*, 146 NLRB 48 (1964), enforced in relevant part 364 F.2d 552 (5th Cir. 1966), the employer told the union that it "was not pleading an inability to pay" and that it could pay " 'whatever we think is right to pay' ", Id. at 53; but the employer's statements were evaluated by the administrative law judge, who found a plea of inability to pay on the basis of the employer's additional claims that the plant was not being operated profitably and that negotia-

tions would be conducted on the basis of the labor costs that the plant could afford. Id. at 54. In *Nielsen Lithographing Co.*, 279 NLRB No. 118 (1986), despite the employer's stated position that it was profitable and not pleading poverty and inability to pay and that it merely wanted to bring its wages and fringe benefits more in line with those of its competitors, the Board found a violation, relying particularly upon the employer's statements that jobs would be lost and the employer would go out of business unless the employees went along with the employer's proposed economic concessions.

Here, even though Respondent contended once that it was merely unwilling to pay and denied that it was in "dire financial straits," each discussion of the reasons that Respondent would not pay led to factual allegations that it could not pay as a result of its own compelling financial considerations. From the beginning, Respondent supported its alleged "unwillingness" with the claim of decreasing profits. That Respondent was profitable in 1984, that it made money through the first quarter of 1985, that it broke even through the remainder of 1985, and that it was losing money in 1986, that 1985 was a bad year and 1986 was even worse, were reasons repeated throughout the parties' discussions and were accompanied with Respondent's representations of declining sales. Zerby said at various times that the bottom line is red, Respondent had to have cost containment, could not commit money to increases, could not commit to a long-term contract, and could not afford increases—all clear indications that there was a financial basis that impelled and dictated Respondent's decision into an intractability demonstrated by Liney's comments that Respondent had a problem, concessions were necessary, and Respondent's proposals for concessions would still be on the table at the very end of negotiations. So serious was Respondent's financial condition that Zerby even threatened that if Respondent did not succeed in its proposals, jobs would be lost. When the matter of a three-year agreement was

discussed, Zerby contended that that would be impossible because Respondent could not afford any increase in a one-year agreement, so it certainly could not agree to an increase in a longer contract.[34] All these arguments were pleas that Respondent could not pay increases and could not continue operating under the terms of its expiring agreement, in the words of the Supreme Court, "without injury to [its] business." *Truitt*, 351 U.S. at 152.

The Board, with judicial approval, has found pleas of an inability to pay in similar circumstances. *Palomar Corp.*, 192 NLRB 592 (1971), enfd. 465 F.2d 731 (5th Cir. 1972) (losing money, later changed to not making sufficient profits, still later to preserve the employers' competitive position); *Celotex Corp.*, 146 NLRB 48, enfd. in relevant part 364 F.2d 552 (5th Cir. 1966) (plant not being operated profitably and negotiations would be conducted on the basis of what employer could afford); *Tony's Meats, Inc.*, 211 NLRB 625 (1974) (large monthly losses during a strike and "can't do anything else"); *Stamco Division*, 272 NLRB 1265 (1977) (employer not in healthy position, earnings lowest of any division of parent corporation, projections of the future did not look great, employer cannot afford an increase); *Mashkin Freight Lines*, 272 NLRB 427 (1984) (business was deteriorating and employer was losing money); and *Nielsen Lithographing Co.*, 279 NLRB No. 118 (1986) (jobs would be lost and employer would go out of business unless employer's concessions granted).

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[34] Even if I did not credit Zerby's use of the word "afford," Langdon admitted that Zerby said that Respondent "could not consider any wage increases as part of a three year contract because it did not expect its financial situation to improve," a statement which clearly implied that Respondent could not afford an increase. In addition, Langdon conceded that the reason why he "incorrectly" wrote the word "afford" in his bargaining notes was that he was anticipating what Zerby would say. I find that Zerby, under all the circumstances, was arguing exactly that.

Respondent nonetheless argues that it never claimed that it was wholly unable to pay.[35] Rather, it had liquidity and, although it was unprofitable at present, it was able to draw upon its reserves to pay its employees and vendors. Of course, no employer can continue to draw upon its reserves indefinitely. Those reserves will run out, and at that point it will surely reach a position of being unable to pay. But, even at an earlier point, in June 1986, it had reached the state of being unable to pay because it had made the decision that it could not continue to operate by drawing upon its reserves "without injury to [its] business." *Truitt*, 351 U.S. at 152. Besides, Zerby's statement about liquidity was merely that Respondent then had sufficient assets to pay its current debts to its vendors and employees—a far cry from stating that Respondent could well afford not only to maintain its current labor costs, without concessions, but also to grant the Union all of the increases that it wanted. Even if Respondent was sufficiently liquid on 30 June to pay its then current obligations, in light of Respondent's projection of continuing and greater losses, there was no assurance that its liquidity would continue.

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[35] Respondent relies on an affidavit Hannings signed during investigation of an earlier surface bargaining charge, in which he stated: "From the outset of the negotiations, [Respondent] took the position that it would not pay the employees any increases despite the fact that it had the ability to do so." Respondent relies upon this statement in its brief to prove that "Respondent's position on 'economics' had been consistent throughout the bargaining sessions." I am persuaded that the word "from" should read "at," because there is no credible proof that from 13 June until 18 September, Respondent ever used its "ability to pay argument," in haec verba. Rather, although Respondent indicated that it had the wherewithal to meet its bills, its principal contentions were that it was unable to grant what the Union wanted and it needed concessions. In addition, Hannings' first affidavit was incorporated in a second affidavit which he gave in support of that charge in which he referred to Zerby's claims on 27 and 30 June of Respondent's unprofitability.

The duty to bargain in good faith is at the heart of the Act, and *Truitt* recognizes that the "ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations." 351 U.S. at 152. If conditions were such in 1956, when the Court decided *Truitt*, they are even more relevant in the 1980's, when employers in many industries, in the face of foreign and internal non-union competition and rising costs, have felt it necessary not only to hold back on wage increases but also to seek concessions in order to limit their labor costs. The Court's finding that claims for increased wages have sometimes been abandoned, while not necessarily the rule, is clearly more factually supported now than in the history of collective-bargaining since the enactment of the Act.

The Court held that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims [and] [i]f such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at page 153. Liney, on 13 June, while claiming that Respondent was unwilling to grant increases, immediately supported his claim with facts of Respondent's unprofitability. While it may be argued that those facts constituted the reasons why Respondent was unwilling to grant increases rather than was unable to grant increases, Respondent's contentions evolved into a claim of its inability to pay based on its judgment that its losses could not continue. Once it began to talk about its reasons for its decision, not in terms of "we simply don't want to" or competition or what was being granted generally in labor negotiations, but in terms of Respondent's specific needs and requirements, that is, the possibility of injury to its business, Respondent opened the door to the Union's equal participation in that discussion.

Collective bargaining is not supposed to be a game. It is supposed to be a struggle of give and take, forceful

presentations of opposing and informed viewpoints, and (if it works) informed consensus and agreement. To permit Respondent to repeatedly urge that it had to have concessions and could not commit to increases, while stubbornly refusing to supply to the Union the relevant information so that the Union could study it and make a cogent and reasoned judgment about the direction it should take, removes or at least diminishes the hope and expectation that an agreement may be reached and impedes the process of collective bargaining. Here, the evidence amply demonstrates that critical to the resolution of the deep breach between the parties' respective demands was the underlying doubt that what Respondent was saying was true. The failure of Respondent to substantiate its position, that its claims were honest ones—especially when Respondent felt that its position was, in the words of *Truitt*, "important enough to present in the give and take of bargaining"—inevitably led to the failure of the parties to reach an agreement.

An analysis of the relevant decisions cited above demonstrates that no matter what particular words have been said, when an employer has steadfastly relied upon its own poor financial condition and projected injury to its business, it has been required to produce information to support its claim. To the contrary, where the employer has made no statements about its own finances, and merely talked about the general economy or its relationship with its competitors, no unfair labor practice has been found. The decisions relied upon by Respondent fall within this category.

In neither *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), nor *Advertisers Mfg. Co.*, 275 NLRB 100 (1985), did the employer assert specifically that its own financial situation rendered it unable to afford any increase that the union proposed.[36] Although not entirely

[36] I noted above my reluctance to find meaningful any of the statements made by the parties at the 18 September negotiating

clear, *Rochester Institute of Technology*, 264 NLRB 1020 (1982), enf. denied 724 F.2d 9 (2d Cir. 1983), reading it most favorably to Respondent, held only that the employer's claim that it could not pay an increase because it had already budgeted for its wage increase did not constitute a claim that it was not otherwise able to pay an increase. But my understanding of the administrative law judge's decision is that he found no violation of the Act because the employer never stated that it could not afford an increase and the union never made demand for financial information.[37]

Respondent argues that Zerby's comment that Respondent could not contend with the continued downward trend in its business or jobs would be lost does not constitute a claim of an inability to pay, relying upon *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir. 1986), cert. denied 107 S. Ct. 88 (1986). There are a number of difficulties with Respondent's argument, not the least of which is that the court's decision does not reflect Board

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session and Liney's follow-up letter. I find that Respondent's position was specifically tailored to conform with Board and court decisions reviewed as a result of the Union's unfair labor practice charge, about which, according to Liney's notes, Liney stated: "[w]e know and believe you know that your positions are totally wrong." I note, particularly, Liney's unsuccessful attempt to deny that Zerby had ever said that Respondent was losing money, his denial that Respondent had ever claimed an inability to pay, and his reference in his 25 September letter to the test set forth in *Atlanta Hilton*, 271 NLRB at 1602, that "profit data will not be required merely because it would be 'helpful' to the union."

[37] With due respect, I disagree with the judge's blanket assertion, 264 NLRB at 1024, that: "I do not believe that 'could not pay' is the equivalent to a plea of economic inability." Whether such a statement is the equivalent depends on the facts in their entirety; and the Board refused to adopt that dicta, for in answer to the judge's conclusion that, even had he credited the union's witnesses, he would find only a technical violation of *Truitt*, the Board wrote, at page 1020 fn. 3: "we find it unnecessary to rely on his further conclusion that Respondent committed 'at best . . . a technical violation of the Act' . . . ."

law. The court refused to enforce the Board's conclusion that a threat of potential loss of jobs is sufficient to impose an obligation to produce financial data. *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984). The Board has instructed its administrative law judges that Board precedents, not court of appeals law, are to be followed unless overruled by the United States Supreme Court. *Insurance Agents (Prudential Insurance Co.)*, 119 NLRB 768, 773 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960); *Fred Jones Mfg. Co.*, 239 NLRB 54 fn. 4 and text (1978).

In addition, the court's decision in *Harvstone Mfg.* is distinguishable. There, the three employers [38] had claimed a competitive disadvantage and in one statement argued that if they did not make a reasonable profit so that they could be viable, competitive businesses, they would not stay in business and no one would have jobs. This single statement, the court held, was nothing more than a truism, finding that, at page 577:

> . . . if an employer operates at a competitive disadvantage for a long enough time, its profit margin, as a matter of pure economics, will decline eventually forcing it out of business. There would then come a time when these three companies could be expected to plead an inability to pay, but that time has not yet arrived. . . . The relevant time period we must concern ourselves with is that of the term of the new collective bargaining agreement. It is quite conceivable that an employer, already operating at a competitive disadvantage with respect to employee compensation, could afford to pay increased wages during the course of a new agreement. While it is axiomatic that this scenario cannot be played out indefinitely, it does not preclude a finding that, at

[38] A fourth employer which, the court noted, claimed that it was losing money, admitted that it had claimed an inability to pay.

> least for the term of the new collective bargaining agreement, the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages. In such a case, we think that the employer's claim of competitive disadvantage is not a plea of inability to pay.

With the exception of two very brief references to its Gastonia facility, Respondent never claimed a competitive disadvantage prior to the strike.[39] Rather, its claim was based upon its own financial projections of a present, continuing, and worsening loss of money and a downward trend of its business. Those claims were not presented by the employers in *Harvstone*, which were profitable businesses and merely anticipating future losses. Here, with Respondent's present losses and dismal view of its prospects, the anticipated job loss was a real one, and not based upon a truism. Furthermore, by linking Respondent's losses to its refusal to commit to a longer term contract and by its insistence on a one-year contract, Zerby's claim was directly related to the term of the new agreement; and the court's decision in *Harvstone* does not apply. Accordingly, Zerby's threat of a loss of jobs represents one more indication that Respondent was pleading an inability to pay.

Finally, Respondent relies upon *Vore Cinema Corp.*, 254 NLRB 1288 (1981), which involved the employer's request to eliminate or reduce the contractual guarantee of five-hour shifts for its projectionists in order to facilitate elimination of a second showing of a film on weekday evenings, when business was slow. The administra-

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[39] On 18 September, according to Langdon's notes, Liney stated that Respondent had never said that it could not afford to pay and that Respondent's approach was to make it profitable, "competitive" —the latter word uttered, I find, to announce Respondent's newly found defense in accord with *Harvstone*. See footnote 36, above. Similarly, Zerby's description at the hearing of his statement as merely a "truism" was not a coincidental reference to *Harvstone*.

tive law judge found, at page 1292, that, although the employer's proposal may have been economically advantageous, it was not equivalent of a statement that it could not afford to pay. Furthermore, the judge specifically discounted what Respondent relies on herein—the employer's statement that "he had lost money in the theater 'and did not want to do this next year' " (at page 1289) —first, because the statement had been made six months prior to the commencement of negotiations and, second, because it was "uttered in a different context" (at page 1292), a dispute over pay for the performance of certain routine chores.[40]

I conclude that none of the authorities relied upon by Respondent sustain its contention that it was not pleading an inability to pay. In addition, I also reject its defense that the complaint is, in essence, a sham, because the Union did not file its unfair labor practice charge in this proceeding until after it did not succeed with its earlier surface bargaining charge against Respondent (Case No. 4-CA-15954), filed on 11 July, alleging that Respondent had entered into negotiations with no sincere desire to reach an agreement.[41] It was not until 19 August that

[40] I reject Respondent's contention that its statement that it could not pay what the Union was seeking and that it had to have concessions were isolated remarks; rather, they constituted the basis of Respondent's rationale. Thus, Respondent's reliance upon footnote 1 in *Washington Materials v. NLRB*, 803 F.2d at 1339, is misplaced.

[41] Respondent moves that I reconsider my rejection of Respondent's Exhibits 5B and 5C, which are, respectively, the dismissal by the Regional Director for Region 5 of that charge and the affirmance of the dismissal by General Counsel's Office of Appeals. Respondent contends that the dismissal is "particularly relevant . . . in view of the Union's admission . . . [in two exhibits which I received in evidence] that the strike of July 1 was caused *solely by the bargaining conduct of Respondent which was the exact subject of the dismissal charge*. A reading of these two documents [the two received exhibits] clearly shows that they contain this admission that the strike was *not* caused by Respondent's refusal to produce financial information." (Emphasis in original.) Respondent con-

the Union filed its first charge in this proceeding alleging that Respondent refused to turn over its books and prove its "inability to pay" contentions. Respondent contends that the late filing of that charge indicates that it was a fabrication,[42] because if a factual basis for it truly existed, it would have been filed earlier, relying upon *Industrial Waste Service, Inc.*, 268 NLRB 1180, 1183 (1984), in which there was a factual issue presented as to what caused a union's strike. One witness testified that the union's membership authorized the strike based on four specific reasons which were to constitute the basis of an unfair labor practice charge, to be filed immediately by the union's attorney who attended the membership meeting. Because the charge that was filed did not mention certain of the specific reasons, I utilized the charge, as well as many other inconsistencies and contradictions in the testimony, to make a credibility finding that not all the four reasons were mentioned. In this proceeding, to the contrary, there is sufficient proof, much from admissions of Respondent's negotiators, that various statements were made at the bargaining table; and there is clearly no similarity between the direct authorization to the union's counsel in *Industrial Waste* to file an unfair labor practice charge and the filing of the charge

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tinues to fail to demonstrate that the rejected dismissal letters, which are not (and could not be) relied on as admissions by a party, are relevant to its position; and I adhere to my original ruling. *Industrial Waste Service, Inc.*, 268 NLRB 1180 (1984), is inapposite. The dismissal letters were admitted there only to limit the scope and intent of the complaint in that proceeding. Counsel for the General Counsel conceded in this proceeding that the instant complaint does not allege that Respondent engaged in surface bargaining, and I have not treated the complaint as so alleging.

[42] Respondent also notes that no request for Respondent's books was made by the union in the two negotiating sessions of 25 July and 15 August. However, "[e]mployees are not required to request the substantiating data on more than one occasion or hound the employer when the information is not produced." *Harvstone Mfg.*, 785 F.2d at 1368.

herein. Furthermore, Section 10(b) of the Act permits a charging party to file a charge within six months of the occurrence of the alleged illegal act. It would be folly to rely upon some delay, permitted by the Act, as the reason, without more, for finding that the event alleged in the charge did not occur.

Finally, Respondent contends, however, that it had no duty to supply its financial information because it was confidential information that could easily be misused. I reject that defense, which is a mere afterthought never expressed during the negotiations as the reason why Respondent would not produce the requested material. Admittedly, if Respondent had raised this issue during negotiations, the question might have been a closer one, primarily because 80 percent of the Respondent's sales were generated from the "Big 3" automakers, including Chrysler, on whose board of directors sits UAW's president. Zerby testified that the "possibility of harm [and] misinterpretation of data given [represented] a very genuine concern on our part," especially that a disclosure of Respondent's profit figures could affect its customers' attitudes in future price negotiations. However, Respondent first raised the issue of confidentiality on 22 October, after the Union had ended its strike; and the Union readily assured Respondent that any information that Respondent supplied would be kept confidential. As a result, on 5 December Respondent mailed certain material to the Union. Clearly, such an arrangement could have been discussed earlier and an accommodation sought from the Union. In the absence of any effort by Respondent to ensure such an accommodation and the absence of any legal authority cited by Respondent for its position, I can find no justification for its defense. Compare, *E.W. Buschman Co.*, 277 NLRB No. 21 (1986), enf. denied 820 F.2d 206 (6th Cir. 1987).[43]

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[43] In support of its "confidentiality" exception, Respondent relies upon the *Truitt* limitation, quoted above at page 20, that: "Each

Having found that Respondent claimed that its financial distress caused it to reject the Union's proposals for wage increases and other benefits and to maintain its own demands for concessions, I conclude that the proof of Respondent's financial condition requested by the Union was relevant to the performance of the Union's collective-bargaining responsibilities. *Truitt*, 351 U.S. at 152-154; *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's requests [44] to produce its books and records to prove its claimed inability to pay. I turn, then, to the second issue presented—whether the Union's strike which commenced on 1 July was an unfair labor practice strike.

An unfair labor practice strike is activity initiated in whole or in part in response to an unfair labor practice committed by the employer. *NLRB v. Cast Optics Corp.*, 458 F.2d 398 (3d Cir. 1972), cert. denied 409 U.S. 850 (1972). The fact that an unfair labor practice is committed before the strike does not establish the requisite causal connection, *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 181 (3d Cir. 1980), cert. denied 454 U.S. 821

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case must turn upon its particular facts." However, in *Atlanta Hilton, supra*, 271 NLRB at 1602 fn. 7, the Board noted: "Although the Court limited its holding, the case has become widely accepted as establishing for all practical purposes . . . an 'automatic' rule." (Citations omitted.)

[44] While Desko testified that all of the Union's requests for Respondent's proof were made conditionally, that is, "if you are claiming an inability to pay, would you please show us your books," I do not credit him. In any event, I am persuaded that Respondent was claiming an inability to pay; and the Union's demands, if stated as Desko testified, merely acknowledged the existence of Respondent's claim. Such phrasing of the demand does not appear to have caused the Board any concern. *C-B Buick, Inc.*, 206 NLRB 6 (1973), enfd. as modified 506 F.2d 1086 (3d Cir. 1974) ("Bold therefore advised Respondent's representatives that if they were 'pleading poverty' the Union should have an opportunity to examine the Respondent's profit and loss statement").

(1981); nor is such a connection established by the fact that the unlawful conduct was coincident with the commencement of the strike. *Tufts Brothers Inc.*, 235 NLRB 808, 810 (1978). On the other hand, as long as an unfair labor practice had "anything to do with" causing the strike, it will be considered an unfair labor practice strike. *Cast Optics Corp.*, 458 F.2d at 407. Thus, even if the strike in this proceeding were prompted in part or even primarily by the Union's dissatisfaction with Respondent's proposals, if the Union's strike was also caused in some part by Respondent's refusal to provide information in support of its economic claims, the strike would be an unfair labor practice strike and the burden would be upon Respondent to prove that the strike would have occurred even if it had not committed an unfair labor practice. *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820-821 (6th Cir. 1975).

At the 1 July Union meeting, the employees were advised that the reasons that Respondent was asking them to accept no wage or other increases and make concessions were that it was unprofitable, that the Union's information was different, that the Union had requested Respondent to show its books, and that Respondent would not show its books. Furthermore, the employees indicated their displeasure with and disbelief of Respondent's rationale at both Union meetings held on 28 June and 1 July, because they thought that Respondent was profitable and able to pay, as indicated in the newspaper article that many carried with them. Their dissatisfaction stemmed directly from the unfair labor practice found herein, that they could not understand why they were being asked to give back economic gains they had made to a company which they thought was solvent and could well afford to grant them even better terms and conditions of employment. Respondent's unproven claim of financial distress, which supplied the rationale for almost all of Respondent's proposals, was the reason for the

rejection of those proposals and the ensuing strike because the employees obviously did not believe that Respondent's claim had any factual basis; otherwise, Respondent would have willingly shown its financial records.

Respondent relies principally on *Burner Systems International*, 273 NLRB 954 (1984), in which the Board found that the union's strike was motivated only by the employees' dissatisfaction with the employer's contract proposal. The Board relied on two grounds: (1) there was only "the briefest mention" of the employer's claim of inability to pay and refusal to permit the union to examine its records, which "prompted no questions or discussion;" and (2) the members voted solely on whether or not to accept the employer's last contract proposal, and the vote was followed with a strike protesting the employer's failure to pay "fair wages."

There are some similarities here. There was only one vote, to accept Respondent's last proposal. From 1 July until sometime in September, the picket signs did not refer to an unfair labor practice, but only that the UAW was on strike or on strike for, among other things, job security, working conditions, and equality. In addition, Sinni and Hannings signed documents (Hannings under oath), stating that the sole cause of the strike was that Respondent bargained with no sincere desire to reach agreement; Plant commented at the 25 July bargaining session that the Union was on strike either because of what Respondent had offered or because of the concessions which Respondent had asked the Union to agree to; and a Union report on negotiations, dated 28 July, made no mention of the strike being caused by Respondent's withholding of its financial data or the strike being an unfair labor practice strike.

The Board has frequently held that the connection between the unfair labor practice and the strike may be inferred from the record as a whole. See, e.g., *Automatic*

Plastic Molding Co., 234 NLRB 681 (1978) enfd. mem. 106 LRRM 2869 (9th Cir. 1979); *Brooks, Inc.*, 228 NLRB 1365, 1367 fn. 12 and text (1977), enfd. in relevant part 593 F.2d 936 (10th Cir. 1979). Although the reaction to the announcement that Respondent would not show its books, according to Ashton, was relatively minor, there was a significant outburst of employee sentiment which cannot be ignored. There was a greater reaction to Respondent's unproved and unbelieved contention that it could not afford increases and needed concessions. And it was the employees' underlying distrust of Respondent, which they did not believe, and which they might have believed, had Respondent not violated the Act, that prompted their even greater reaction to all the concessions which Respondent proposed.

Unlike *Burner Systems*, there was more than a mere passing reference to Respondent's claim of financial inability. It was discussed at both Union meetings and evoked a vociferous, and sometimes obscene, reaction from the employees. Furthermore, whereas in *Burner Systems* the union demanded to see the employer's books only once in three meetings and its demand appeared to have little meaning in the overall context of the negotiations, here, to the contrary, Respondent's claim and the Union's reluctance to believe that claim constituted the essence of the dispute and the primary cause of the strike.

I find no important inconsistency between the other facts relied upon by Respondent and the conclusion that the strike was caused, at least in part, by Respondent's unfair labor practice. The written statements that Respondent bargained "with no sincere desire to reach an agreement" were submitted in support of the Union's earlier surface bargaining charge, which alleged a violation of Section 8(a)(5) of the Act in those very words, relying, I assume, on *Herman Sausage Co., Inc.*, 122 NLRB 168, 171 (1958), enfd. 275 F.2d 229 (5th Cir.

1960). Accordingly, I find the statements were self-serving conclusions to support the charge in that proceeding. Plant's statement was nothing more than an expression of dissatisfaction with what Respondent had offered to the Union, an offer which may have bene more satisfactory, had Respondent shown its books. I do not find that her statement excluded the unfair labor practice herein. The Union's report on negotiations, rather than evidence of the employees' motivation, is almost exclusively a report on what Respondent and the Union proposed. Finally, like Plant's statement, the picket signs were not inconsistent with an expression of the employees' discontent with Respondent's proposals, caused by their belief that Respondent was a profitable company which could afford to give them what they wanted and their knowledge that Respondent refused to prove its claim of an inability to pay. In any event, the Board has held that picket sign language is not necessarily determinative of the purpose of the strike and that the absence of any reference to the strike being a protest against an unfair labor practice does not exclude such a practice being the cause of the strike. *Lifetime Door Co.*, 179 NLRB 518, 522-523 (1969); *Head Division, AMF*, 228 NLRB 1406 (1978), enfd. 593 F.2d 972, 979-981 (10th Cir. 1979).

Accordingly, I find that Respondent's position of inability to pay and failure to produce proof that it was unable to grant increases and needed concessions constituted a substantial cause of the strike. *Buffalo Concrete*, 276 NLRB 839, 841-842 (1985), enfd. in relevant part sub nom. *Washington Materials, Inc. v. NLRB*, 803 F.2d 1333 (4th Cir. 1986); *Stanley Building Specialties Co.*, 166 NLRB 984, 986 (1967), enfd. sub nom. *Steelworkers Local 5571 v. NLRB*, 401 F.2d 434 (D.C. Cir. 1968), cert. denied sub nom. *Stanley-Artex Windows v. NLRB*, 395 U.S. 946 (1969); *Stafford Trucking, Inc.*, 166 NLRB 894, 897-899 (1967); *Flowers Baking Co., Inc.*, 169 NLRB 738, 749 (1968), enfd. 418 F.2d 244 (5th Cir. 1969).

Respondent also contends that the Union would have conducted a strike in any event, citing *NLRB v. Stackpole Carbon*, 105 F.2d 167 (3d Cir. 1939), cert. denied 308 U.S. 605 (1939). The parties presented much evidence of the conduct of negotiations; and, although the testimony by no means reflects what happened during every minute, there was testimony of some discussion of substantive matters, and the notes of the negotiations clearly demonstrate that the numerous proposals by both parties were discussed. There is no question that at some stage some very difficult issues had to be resolved, not the least of which was Respondent's demand for the elimination of the union security and checkoff provisions, about which Hannings commented that those were "an absolute necessity," that the Union would never accept their removal, and that he would be fired if he agreed to their elimination. Hannings also referred to strict seniority, which Respondent sought to alter, as the "Union pillars of the foundation." Furthermore, Sinni referred to many of Respondent's proposals as "beyond my acceptance" and presenting "serious" and "strike" issues, only a few of which did not involve money.[45]

Threats of strike and contentions that certain proposals are "musts" are commonplace in collective-bargaining negotiations. They constitute no proof that the parties are at an impasse. I am unimpressed with the notion that various disputes at the negotiating table had no chance of resolution merely because statements were made indicating that the Union would not compromise. Rather, I find that what prevented progress in the negotiations was the dispute regarding the affordability of the Union's proposals and the need for Respondent's concessions. If

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[45] Among them were Respondent's proposals to retain employees in the event of layoff without regard to seniority, to increase its use of temporary employees outside the coverage of the agreement, to reduce the number of shop stwards, and to share the cost of arbitrations. Even as to some of these proposals, the Union had offered compromises.

the Union became satisfied with validity of Respondent's financial dilemma, it promised to bargain about concessions; and it cannot be predicted that bargaining would have failed or that the non-economic items would not have been resolved.[46]

Accordingly, I find that there is no sufficient proof that the Union would have conducted a strike had there been no unfair labor practice and conclude that the Union's strike was, from its inception on 1 July, an unfair labor practice strike. When the Union, on 6 October, made an unconditional offer on behalf of Respondent's employees for them to return to work, Respondent was legally required to reinstate all strikers within five days of the offer, discharging replacement employees, if necessary. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Drug Package Co., Inc.*, 228 NLRB 108, 113 (1977), enfd. in part 570 F.2d 1340 (8th Cir. 1978). It is uncontested that Respondent did not reinstate the unfair labor practice strikers whose names are set forth in Appendix A, attached to this Decision; and its failure to do so constitutes a violation of Section 8(a)(3) and (1) of the Act.

Respondent, did, however, offer reinstatement to some of the strikers after 6 October, but the complaint alleges that Respondent inordinately delayed offers of reinstatement to five of its employees and that, although they were reinstated, they are entitled to be made whole for the period from 6 October, the date of the Union's unconditional offer, until the date they were reinstated. Respondent admitted that the following employees were not

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[46] The UAW has entered into one contract with its largest employer in its Pennsylvania, southern New Jersey, and portion of Delaware district which does not have a "full union security agreement." The UAW's constitution requires that members have the right to vote on an employer's last and final offer, so that the members could have approved anything they desired. In addition, the Union entered into concessionary agreements with two employers in 1980.

reinstated until the following dates: Joseph Rascionato and Patricia Barnes, 27 October; Anna Mae Michener, 3 November; James White, 5 November; and Walter Bryan, 10 November. Accordingly, I conclude that the delay in reinstating these five employees violated Section 8(a)(3) and (1) of the Act. *Harris-Teeter Super Markets, Inc.*, 242 NLRB 132 fn. 2 (1979), enfd. 644 F.2d 39 (D.C. Cir. 1981).

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom, post an appropriate notice, and take certain affirmative action designed to effectuate the purposes and policies of the Act. Although Respondent argues that it has turned over to the Union financial records sufficient to satisfy its legal obligation under Section 8(a)(5), an analysis of the document reveals that it is impossible to ascertain from it the accuracy of precisely what Respondent was claiming, that is, whether the Colmar facility made a profit in the first quarter of 1985, whether it was only breaking even in the last three quarters of 1985, and whether it sustained a loss in 1986, all not due to a diversion of assets to or an investment of assets in the Gastonia, North Carolina facility.[47] Accordingly, I shall recommend that

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[47] Respondent argues that, when it forwarded financial material to the Union in December, the Union never materially and meaningfully changed its proposals. However, as I found, the material forwarded by Respondent did not satisfy the Union's demand. In any event, what actually occurred in December is irrelevant to determine whether Respondent committed a violation of the Act in June. Certainly, Respondent cannot prove that, as of June, the production of its financial information would not have led to the Union's change of its bargaining position. Furthermore, even if Respondent had delivered in December some material which substantiated its claim of an inability to pay, that would not relieve it of its unfair labor practice or of the remainder of the relief recommended herein. *Unoco Apparel, Inc.*, 208 NLRB 601, 610 (1974), enfd. 508 F.2d 1368 (5th Cir. 1975).

Respondent be ordered to produce financial documents sufficient to satisfy the Union of the precise nature of Respondent's claim of inability to pay increases or to maintain the level of wages and benefits provided for in its last subsisting collective-bargaining agreement, and its claim that it needs the concessions which it proposed.

I shall also recommend that Respondent be ordered to make whole Joseph Rascionato, Patricia Barnes, Anna Mae Michener, James White, and Walter Bryan for any loss of earnings they may have suffered by reason of Respondent's failure to rehire them timely, by paying them a sum of money equal to that which they normally would have earned had they been rehired on 6 October 1986,[48] less earnings during such period, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest therein, in accord with *New Horizons for the Retarded*, 283 NLRB No. 181 (28 May 1987).[49]

Additionally, I shall recommend that Respondent be ordered to offer all employees whose names are listed in Appendix A, attached hereto,[50] reinstatement to their

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[48] In view of Respondent's unlawful rejection of the strikers' unconditional offer to return to work, the 5-day period during which backpay is tolled, usually granted to employers in situations where no unconditional offer has been made, is inapplicable. *Drug Package Co.*, 228 NLRB at 114; *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1977), enfd. 602 F.2d 73 (4th Cir. 1979).

[49] In accordance therewith, interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as provided in the 1987 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[50] Counsel for the General Counsel was requested to and did submit a proposed order setting forth the relief he requested herein. I have, in addition to making some typographical corrections, added to the list of discriminatees the names of Charolette Cardillo and Nouran Riad, whose names appear to have been omitted. The name of "Althea Ann Hersh" seems to be an inadvertent combination

former positions, or if those positions no longer exist, to similar positions, without prejudice to their seniority and other rights and privileges previously enjoyed, dismissing if necessary replacement employees hired on or after 1 July 1986, and make whole all such named employees for any loss of earnings they may have suffered from 6 October 1986 to the dates upon which Respondent unconditionally offers them reinstatement. The make whole remedy and interest shall be computed as set forth above.

Counsel for the General Counsel also requests that the order include a "visitorial clause" authorizing the Board to engage in discovery in the manner provided by the Federal Rules of Civil Procedure under the supervision of a court of appeals, should one enforce my recommended order. This relief has been requested as a matter of course for more than a year, and the Board has uniformly denied it in individual cases, without explanation.[51] The relief granted herein is the normal relief granted in an unfair labor practice case, requiring in essence offers of reinstatement and payment of backpay. But for the number of discriminatees involved and possibly the total monetary exposure of Respondent, there is nothing unusual about the relief which I have recommended. I am persuaded, until the Board instructs me to the contrary, that the relief that the Board has traditionally granted is sufficient to ensure that Respondent will comply herewith; and I deny the requested relief.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding,[52] in-

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of "Althea Lawrence" and "Deborah Ann Hersh"; I have included both names in Appendix A.

[51] The Board heard oral argument on the general issue in September, 1986, but has not yet ruled.

[52] The transcript on page 399 of the record is confused and badly transcribed, and, unfortunately, my notes and precise recollection

cluding my observation of the demeanor of the witnesses as they testified and my consideration of the briefs filed by counsel for the General Counsel, Respondent,[53] and the Union, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[54]

ORDER

Respondent Gas Spring Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local No. 1612 as the collective-bargaining representative of the production and maintenance employees at its Colmar, Pennsylvania facility by failing and refusing to turn over

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are not thorough enough to sufficiently complete the page. I believe that I misstated "sustained" on line 9 and that thereafter, I corrected myself, so that line 12 should read "Pardon me. Overruled."

Respondent moves that I reverse my rejection of Respondent's Exhibit 1, a balance sheet of Fichtel & Sachs, which includes Respondent's profit and lost statement for the years 1985 and 1986. Respondent offered it to prove the bona fides of its claim during negotiations of a loss for 1986. Because it is irrelevant whether Respondent's claim was true or false and because the only issue relevant to this proceeding is whether Respondent claimed an inability to pay (whether true or false), I deny Respondent's motion.

[53] Respondent submitted a reply brief, which counsel for the General Counsel moved that I not consider on the ground that reply briefs are not provided for in the Board's Rules and Regulations. Respondent did not oppose the motion, which is granted. *J.E. Cote*, 101 NLRB 1486 fn. 4 (1951).

[54] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to the Union, on request, financial records relevant to collective bargaining.

(b) Discouraging membership in the Union or any other labor organization by failing and refusing to reinstate and by delaying the reinstatement of unfair labor practice strikers upon their unconditional offer to return to work, and otherwise discriminating against its employees with regard to their hire, tenure, or other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which will effectuate the polices of the Act:

(a) Provide the Union, upon request, with all books and records containing information relevant to the substantiation of Respondent's claims that it is financially unable to meet the Union's economic demands and that it needs concessions.

(b) Make whole its employees Joseph Rascionato, Patricia Barnes, Anna Mae Michener, James White, and Walter Bryan for any loss of earnings and benefits they may have suffered, with interest, from October 6, 1986 until the date on which they were reinstated by Respondent, in the manner set forth in "The Remedy" section of this Decision.

(c) Offer to each of the employees listed in Appendix A attached hereto immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary replacement employees hired on or after 1 July 1986, and make them whole for any loss of earnings and other benefits resulting

from Respondent's failure to reinstate them, in the manner set forth in "The Remedy" section of this Decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Colmar, Pennsylvania facility copies of the attached notice marked "Appendix B." [55] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 30, 1987

/s/ Benjamin Schlesinger
BENJAMIN SCHLESINGER
Administrative Law Judge

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[55] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

Katherine Herman
Antoinette Staffieri
Betty Marquis
Charolette Cardillo
William Cavanaugh
Linda Fitzgerald
Sandra Nolen
Teresa Wisniewski
Nancy Eroh
Bernard Alston
Henda Twyman
Anne Thompson
Jeanne Hoff
Leon Campbell
Kenneth Longfellow
Vanessa Hamaday
Indu Kasat
Ronald Weidemoyer
Sung Doo Lee
Stewart Warburton
Dale Fichter
Mark Wiater
F. Wayne Goshen
Wilmer Rothrock
Maryanne Wisniewski
Delores Bunch
Choong Keun Yoo
Garth Patterson
Luci Jones
Jong Eun Moon
Cindy Seok
Evelyn Byrd
Ruth Carr
Timothy Morselander
Sung Soo Park
Michael Todorow, Jr.
Ricardo Parkins
Karen Walker
Margaret Giovinazzo
Kathleen Hein
Patricia Detwiler
Ethel Fritz
Mattie Bookard
John Ruane
June Dasconio
Nancy Schnable
Lucille Elwood
Phyllis Plant
Cary Jarrett
Tae Im Chun
Judith Emenhizer
L. Margaret Cressman
Mary Lou Mull
Helen Beauvais
Sandra Todorow
Owen Urquhart
Raeann Deily
Michael DeCicco
Raymond Erb
Donna Tipton
Mary Kuhn
Winnifred Johnston
Bong Soon Jun
Mahendra Patel
Joseph Mascucchini
Mary Veneziale
William Leslie
Constance Hamaday
Elaine Werkiser
Thomas Markert
Theodore Guinther
Bohdan Marchuk

Anthony Giovinazzo
Dale Childress
Thomas Leondard
Virginia Lawrence
Lucy Boyd
Althea Lawrence
Deborah Ann Hersh
Chung Hwa Kim
Soon Yong Kim
Dok Im Pak
Sheila Ferguson
Sue Madison
Dominic Paone
Joseph Emenhizer
Mark Daley
Willard Worthington
Thomas Desko
Albert Hersh, Jr.
James Lindsay
Miriam Bussetti
Sylvia Cichon
Renee Kramer
James Miller
William Schumaker
Carol Rims
Dorothy Dasconio
Ronald Smith
Nancy Balch
Soo Im Kye
Soon Im Yeon
Jaishri Patel
Constance Quesada
Nouran Riad
Soon Myong Moon
Soon Ja Cho
Hye Sun Yang
Han Kyoo Lee
Kathleen Fretz
Connie Gahman
Eva McKine
Marilyn Gage
Rose Bergen
Sung Soon Park
Doris Snyder
Mary Reichwein
Susan Gettler
Doris Ritty
Sharda Dadhich
Louis Verdeur
Gap Sohn Yang
Sallie Shisler
Theresa Dusza
John Schaller
Patricial Rivera
Jean Malachwoski
Sylvia Kim
William Grant
Brenda Foster
William Balliet
Rose Bosco
Elizabeth Devine
Charlene Hill
Teresa Araco
Ross Herstine
Jay Mahan
Ramgopal Asopa
Rose Rossi
Robert Taylor
Dorothy Klinedinst
Devita Gohel
Clarence Runkle
Michael O'Malley
Se Hyeon Kim
Bruce Myers
Gregory O'Sullivan
Joon Ok Sim

Samuel Wright III
Chris Randall
Michael Ferguson
Helen Bonanni
Hyung Jin Kim
Kamal Riad
Renate Burkey
Sherry Wilson
Jae Choon Choi
Gertrude Evanson
Samuel Wright

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local Union No. 1612 as the collective-bargaining representative for our production and maintenance employees at our Colmar, Pennsylvania facility by failing and refusing to turn over to the Union, on request, financial records to collective bargaining.

WE WILL NOT discourage membership in the Union or any other labor organization by failing and refusing to reinstate and by delaying reinstatement of unfair labor practice strikers upon their unconditional offer to return to work, and otherwise discriminate against our employees with regard to their hire, tenure, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL provide the Union, upon request, with all books and records containing financial information relevant to the substantiation of our claims that we are financially unable to meet the Union's economic demands and that we need concessions.

WE WILL make whole our employees Joseph Rascionato, Patricia Barnes, Anna Mae Michener, James White, and Walter Bryan for any loss of earnings they may have suffered, with interest, from October 6, 1986 until the date on which they were reinstated by us.

WE WILL offer to each of the employees listed in Appendix A attached hereto immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary replacement employees hired on or after 1 July 1986, and make them whole for any loss of earnings and other benefits resulting from our failure to reinstate them, with interest.

GAS SPRING COMPANY
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed by the Board's Office, One Independence Mall—7th Floor, 615 Chestnut Street, Philadelphia, Pennsylvania, 19106, Telephone 215-597-7643.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2448

GAS SPRING COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, and ITS LOCAL UNION No. 1612,
Intervenor

On Petition for Rehearing with Suggestion for Rehearing In Banc

Filed August 21, 1990

Petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Wilkinson and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk